**APPENDIX A**

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

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Nos. 00-14763, 00-15068 and 01-13058

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Nov. 14, 2002

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ALABAMA POWER COMPANY,
*Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
*Respondents*,

ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION, COMCAST CABLEVISION OF DOTHAN, INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION,
*Intervenors*.

GULF POWER COMPANY,
*Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
*Respondents*,

AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION,
*Intervenors*.

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ALABAMA POWER COMPANY AND GULF POWER COMPANY,
*Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES,
*Respondents*,

ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION, COMCAST CABLEVISION OF DOTHAN, INC., *et al.*, AND AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, *et al.*,
*Intervenors*.

Before TJOFLAT, BARKETT and WILSON, Circuit Judges.

TJOFLAT, Circuit Judge:

As part of the Telecommunications Act of 1996, Congress amended the Pole Attachment Act of 1978 to give cable television companies the right to acquire space on the utility poles of power companies at rates established by a formula (the "Cable Rate")[1] promulgated by the Federal Communications Commission ("FCC" or "Commission"). *See* 47 U.S.C. § 224. Under the regulatory scheme, if the parties are unable to agree on the price, the cable company can seek relief in the FCC's Cable Bureau. In this case, the Cable Bureau, and on review, the FCC, rejected the price demanded by Alabama Power ("APCo") for a cable television company's mandatory right of access to its utility poles, and it ordered the parties to negotiate a price within the parameters of the Cable Rate. *See In the Matter of Ala. Cable Telecomm. Ass'n et al. v. Ala. Power Co.*, 16 FCC Rcd. 12,209 (2001). APCo, Gulf Power Company ("Gulf Power"), and several intervenors now ask us

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[1] The mathematical expression of the Commission's rules, found in 47 C.F.R. § 1.1409(e)(1), is as follows:

> Maximum Rate = (Space Occupied by Attachment / Total Usable Space) x Net Cost of Bare Pole x Carrying Charge Rate

to declare that the rate imposed by the FCC does not provide just compensation and therefore violates the Takings Clause of the Fifth Amendment. In essence, the petitioners are using this case as a vehicle to mount a challenge to the rate methodology set forth in 47 U.S.C. § 224(d)[2] and the FCC's implementation of the rate methodology in 47 C.F.R. §§ 1.1401 *et seq.* We hold that based on the particular facts of this case, the petitioners have failed to meet their burden of proof. We therefore deny the petitions for review.

The factual context of this case is difficult to comprehend without an understanding of the economic and legislative climate existing prior to the 1996 Act, as well as the history of Fifth Amendment litigation in the pole attachment context. Part I of this opinion provides this necessary background. Part II takes a detour from the primary focus of this case by addressing the standing and exhaustion issues presented. The heart of the case is found in part III, where we find that there has been no violation of the Takings Clause. Finally, part IV addresses arguments concerning the administrative process, such as whether the FCC acted in a way that is arbitrary and capricious, or whether it failed to provide the litigants with due process.

## I.

Certain firms have historically been considered to be natural monopolies—bottleneck facilities that arise due to network effects[3] and economies of scale.[4] Such firms have

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[2] The rate for cable television attachments is prescribed in 47 U.S.C. § 224(d), which states: "[A] rate is just and reasonable if it assures a utility of recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of usable space which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way."

[3] Network effects often enhance the monopoly position of firms that operate in industries where a large number of common customers is

historically included electric utilities, local telephone companies,[5] and oil pipelines. *See generally* Richard D. Cudahy, *Whither Deregulation: A Look at the Portents,* Ann. Surv. Am. L. 155 (2001). Firms in other markets frequently need access to these bottlenecks in order to compete. The "essential facilities" doctrine in antitrust law has often provided the legal remedy for such problems. *See, e.g., Otter*

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especially advantageous. *See* Stuart M. Benjamin, Douglas G. Lichtman, and Howard A. Shelanski, *Telecommunications Law and Policy* 616 (2002) ("All else equal, wouldn't you have a strong incentive to select the phone company that had the largest number of customers with whom you might want to converse? Once you join, can you see how this same phenomenon would increase the pressure on, say, your friends and family—which in turn would put pressure on their friends and family—to join the same phone network, thus increasing any monopoly tendency already at play in the market?"). The cost of competing with an incumbent firm in a network industry may well be insurmountable. As the Supreme Court recently explained: "A newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network, the most costly and difficult part of which would be laying down the 'last mile' of feeder wire, the local loop, to thousands (or millions) of terminal points in individual houses and businesses." *Verizon Communications Inc. v. FCC,* 535 U.S. 467, 122 S.Ct. 1646, 1662, 152 L.Ed.2d 701 (2001).

[4] Economies of scale typically arise when long-run average total cost declines as output increases. *See* Benjamin et al., *Telecommunications Law and Policy* 376 (2001). This attribute is common in industries where the initial fixed cost is very large and variable costs are comparatively slight. *Id.* The result is that "eventually there will be only a single company, because until a company serves the whole market it will have an incentive to keep expanding in order to lower its average costs." *Omega Satellite Products Co. v. Indianapolis,* 694 F.2d 119, 126 (7th Cir.1982) (Posner, J.).

[5] A central premise of the 1996 Act is that local exchange carriers (LECs) may not be natural monopolies after all. *See* Benjamin et al., *Telecommunications Law and Policy* 715 (2001) ("[P]olicymakers and entrepreneurs were ready to question the underlying assumption that local service should—or at least as a practical matter would—be provided by state-sanctioned monopolists.").

*Tail Power Co. v. United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *see generally* Phillip E. Areeda & Herbert Hovenkamp, 3A *Antitrust Law* ¶ 772 (1996). Over the last several years, however, Congress has sought to codify forced-access regulations rather than resorting to judge-made principles of antitrust law. The most noteworthy effort in this vein was the Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et. seq.* In that monumental legislation, Congress sought to break the hold of incumbent telephone monopolies and pave the way for local competition. As an intermediate step toward the end-game of facilities-based competition, Congress allowed competitive local exchange carriers (CLECs) to gain forced access to the unbundled network elements (UNEs) of incumbent local exchange carriers (ILEC) at regulated rates.[6] *See* 46 U.S.C. § 251(c)(3).

In another provision of the Act, Congress turned its attention away from the relationship between CLECs and ILECs and focused on the relationship between cable television companies and electric power companies. Power companies have something that cable companies need: pole networks. Concerned about the monopoly prices power companies could extract from the cable companies, Congress allowed cable companies to force their way onto utility poles at regulated rates. This regime was not entirely born in 1996, however. The only novel part of the 1996 Act was *forced* access. Pole attachments have in fact been regulated since 1978, and our story must therefore turn to an earlier date.

Since the dawn of the cable television industry, cable companies have attached their cables to utility poles owned by telephone companies and, more frequently, power

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[6] The rate formula promulgated by the FCC (known as "TELRIC") has been the source of several statutory and constitutional challenges. *See, e.g., Verizon Communications Inc. v. FCC,* 535 U.S. 467, 122 S.Ct. 1646, 1662, 152 L.Ed.2d 701 (2001).

companies. In the view of Congress, the costs of erecting an entirely new set of poles would have created an insurmountable burden on cable companies. As the owner of these "essential" facilities, the power companies had superior bargaining power, which spurred Congress to intervene in 1978. The Pole Attachment Act of 1978 gave the FCC authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable" in any state that does not already have such regulations in place. 47 U.S.C. § 224(b)(1). The Act further provided that the minimum reasonable rate is equal to "the additional costs of providing pole attachments," while the maximum reasonable rate is to be calculated "by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way." 47 U.S.C. § 224(d)(1).[7] Based on these guidelines, the FCC promulgated regulations that focused on the upper end of this range. Importantly, the 1978 Act did not *force* power companies to yield access; the regulated rates applied only if (and when) voluntary agreements were entered into. These regulations led to a constitutional challenge under the theory that, under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), they worked a *per se* physical taking without providing just compensation. This court partially agreed and held that the FCC's Order effected a taking of Florida Power's property. *Florida Power Corp. v. FCC,* 772 F.2d 1537, 1544 (11th Cir.1985). We

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[7] This rate formula, unchanged since 1978, was restated more clearly by the Supreme Court: "The minimum measure is thus equivalent to the marginal cost of attachments, while the statutory maximum measure is determined by the fully allocated cost of the construction and operation of the pole to which cable is attached." *See FCC v. Florida Power Corp.*, 480 U.S. 245, 253, 107 S.Ct. 1107, 1113, 94 L.Ed.2d 282 (1987).

went on to hold, however, that the FCC, as an administrative agency rather than an Article III court, did not have the power to determine what is just compensation for purposes of the Fifth Amendment Takings Clause. *Id.* The Supreme Court reversed, holding that *Loretto* did not apply because the Act did not *require* power companies to give access to cable companies. *See FCC v. Florida Power Corp.*, 480 U.S. 245, 251-53, 107 S.Ct. 1107, 1111-12, 94 L.Ed.2d 282 (1987). The Court asserted, "[I]t is the invitation, not the rent, that makes [*Loretto*] different. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license." *Id.* at 243, 107 S.Ct. at 1112. Therefore, the *per se* rule of physical takings did not apply, and the Court upheld the rate regulation under the "traditional" Fifth Amendment standard that applies to rate regulations: "So long as the rates set are not confiscatory, the Fifth Amendment does not bar their imposition." *Id.* (citing *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 53, 56 S.Ct. 720, 726, 80 L.Ed. 1033 (1936)). In sum, the Supreme Court found that there was no Fifth Amendment violation, and therefore did not address whether the initial determination of just compensation could be made by an administrative agency subject to judicial review. *Florida Power,* 480 U.S. at 254, 107 S.Ct. at 1113 n. 8.

Fast forward to 1996. As part of the sweeping changes Congress brought about through the Telecommunications Act of 1996, Congress amended the 1978 Act by giving cable companies a right of forced attachment. That is, power companies could not decline offers to attach at regulated rates, save for the statutory exceptions of insufficient capacity or some safety, reliability, or other engineering problem. *See* 47 U.S.C. § 224(f)(2).[8] This change to a forced-access

[8] A panel of this court recently used this statutory exception as the basis for vacating an FCC rule which forced power companies to enlarge

regime was perhaps spurred by new laws, consistent with the 1996 Act's vision of competition in all sectors of the data distribution business, that gave large power companies freedom to enter the telecommunications business rather than remain quarantined to the electricity business. Pub.L. No. 104-104, § 103 (1996). Perhaps fearing that electricity companies would now have a perverse incentive to deny potential rivals the pole attachments they need, Congress made access mandatory. *See Southern Company v. FCC,* 293 F.3d 1338, 1341-42 (11th Cir.2002) ("Cable companies were fearful that utilities' prospective entry into the telecommunications market would endanger their pole attachments, as utilities would be unwilling to rent space on their poles to competing entities. Congress elected to address both of these matters in the 1996 Telecommunications Act."). In all other respects, however, the regulatory regime remained the same. Because of this statutory change—ever important in light of the Supreme Court's distinction of *Loretto* from *Florida Power*—power companies renewed their Takings Clause challenge.

In one case, the power companies took aim at the statute itself, alleging that it was facially unconstitutional because it took property without just compensation. The district court held that the amendment effected a *per se* taking, but granted summary judgment in favor of the FCC. *See Gulf Power Co. v. United States,* 998 F.Supp. 1386 (N.D.Fla.1998). In conclusory fashion, the court found the compensation to be "just," *id.* at 1386, and also held that the availability of judicial review by an Article III court rendered the initial

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pole capacity at the request (and expense) of attaching cable and telecommunications companies. *See Southern Company v. FCC,* 293 F.3d 1338, 1346-47 (11th Cir.2002). The panel could not reconcile the no-capacity excuse allowed under the statute with the forced build-out rules required under the FCC's regulations, and thus held the regulations to be *ultra vires.*

determination of just compensation by the agency constitutionally permissible, notwithstanding our earlier holding in *Florida Power,* 772 F.2d at 1544. We affirmed for different reasons, agreeing with the district court that the Act works a *per se* taking under *Loretto,* but that the Act provides an adequate process for obtaining judicial review.[9] *Gulf Power Co. v. United States,* 187 F.3d 1324 (11th Cir.1999) ("*Gulf Power I*"). However, we rejected the facial challenge, holding that the parties failed to show that no set of circumstances exist under which the Act would be valid.[10]

In another case, the power companies filed a petition for review in this court, seeking reversal of an FCC Order, *In re Implementation of Section 703(e) of the Telecommunications Act of 1996,* 13 FCC Rcd. 6777 (1999), that devised a formula for computing the attachment rent. *See Gulf Power Co. v. FCC,* 208 F.3d 1263 (11th Cir.2000) ("*Gulf Power*

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[9] Like the district court, we held that the availability of judicial review in the court of appeals made the process for determining "just compensation" constitutionally permissible. We went on to enumerate "at least five means at its disposal to gather the information needed to determine just compensation." *Gulf Power v. United States,* 187 F.3d 1324, 1334-35 (11th Cir.1999). A court of appeals could: (1) rely on the evidentiary submissions in the record of the FCC proceeding; (2) remand the case and direct the FCC to supplement the record pursuant to 28 U.S.C. § 2347(c); (3) transfer the case to a district court for full hearing pursuant to 28 U.S.C. § 2347(b)(3); (4) appoint a special master to hold hearings pursuant to Fed. R.App. P. 48; (5) or fashion any other "appropriate modes of procedure" to gather evidence it needs pursuant to the All Writs Act, 28 U.S.C. § 1651.

[10] Our holding on this point is somewhat confusing in that it seemingly held both that (a) the challengers failed to meet their burden of proof to show that in all situations the rate formula would inevitably be unconstitutional and (b) the takings claim was not ripe for review. This need not concern us here, and in any event there is an obvious affinity between the ripeness doctrine and the standard for facial challenges: both doctrines frequently require the challenger to bring a concrete, as-applied challenge.

*II*"). We held that (1) the FCC lacked jurisdiction to regulate pole attachments to the extent that the attaching cable operators also offered Internet service, (2) the 1996 Act authorized a taking as previously determined by *Gulf Power I*, and (3) the just compensation claim failed because the parties did not establish that there was no set of circumstances in which the FCC's rate regulation (like the general statutory rate scheme challenged in *Gulf Power I*) would be valid. The first holding was subsequently reversed by the Supreme Court in *National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 122 S.Ct. 782, 151 L.Ed.2d 794 (2002).

Forced to bring a challenge in an as-applied context, APCo seized its opportunity in June 2000. APCo sent several letters to cable companies stating that it would terminate attachment agreements unless the cable companies agreed to higher rates.[11] Specifically, APCo demanded an annual rate of $38.81 per pole rather than the current $7.47. Various cable companies[12] sought relief by filing a complaint against APCo in the FCC's Cable Bureau, which ultimately found for the cable companies. The Bureau ordered APCo to reinstate the old $7.47 fee until a new agreement within the parameters of the Cable Rate could be reached. *Ala. Cable Telecommunications Ass'n v. Alabama Power Co.*, 15 FCC Rcd. 173,461 (2000). Meanwhile, a similar proceeding was initiated against Gulf Power by the Florida Cable Telecommunications

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[11] The pole attachment agreement between APCo and AT&T Cable Services was typical of the agreements worked out by cable and power companies. Section 31 of the agreement provided for an initial three year term (which had expired by the time APCo sought termination), followed by "continuation" unless either party provided the other with 90 days notice of cancellation.

[12] The initial complaint was filed by the Alabama Cable Telecommunications Association and Comcast Cablevision of Dothan, Inc.

Association and three cable Internet service providers, although that case languished in the Bureau and has yet to come to a resolution. Both APCo and Gulf Power filed petitions for review of the adjudication against APCo in this court, nos. 00-14763 and 00-15068, and they simultaneously sought review by the full Commission.

Since the initial filing of these petitions, two important decisions have been rendered. First is the Supreme Court's decision in *National Cable*. In that case, the Court reversed our first holding in *Gulf Power II* (regarding the FCC's jurisdiction) and thereby answered the jurisdictional arguments raised in this case. Thus, any contention that the FCC lacks jurisdiction to regulate the attachment rates of cable companies that also offer Internet services must fail. The second decision is the full Commission's Order affirming the Cable Bureau in the APCo proceeding. *See In the Matter of Alabama Cable Telecommunications Ass'n et al. v. Alabama Power Co.*, 16 FCC Rcd. 12,209 (2001). That decision rendered moot the FCC's argument that we ought not reach the merits of this case because the parties failed to exhaust their administrative remedies.[13] The Order also becomes the focus of any challenge under the Administrative Procedure Act, 15 U.S.C. § 706.[14]

In short, the as-applied context of this litigation, combined with the recent decisions of the FCC and Supreme Court, eliminate any threshold concerns that would otherwise preclude us from reaching the merits, such as ripeness, exhaustion (and hence the jurisdiction of this court), and the

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[13] That is, the Order eliminated any exhaustion problem that would have precluded us from reaching the merits at all. As we shall explain, however, the Order did not eliminate all exhaustion concerns.

[14] "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 15 U.S.C. § 706(2)(A).

jurisdiction of the FCC. Moreover, our decisions in *Gulf Power I* and *Gulf Power II* establish that the 1996 Act effects a taking, and our decision in *Gulf Power I* establishes that an initial determination of just compensation by the FCC is constitutionally permissible so long as there is judicial review in an Article III court.[15] The primary issue in this case, then, is a narrow one: whether the rate authorized by the FCC provides APCo with just compensation.

II.

A.

Before we address the merits, two threshold issues warrant our attention. First, the Communications Act of 1934 requires an application for review to the full Commission as a prerequisite to judicial review of decisions made under delegated authority. *See* 47 U.S.C. § 155(c)(7).[16] The mere act of filing an application alone does not satisfy the jurisdictional prerequisite. The petitioners must give the Commission an opportunity to issue a final decision; otherwise, the statutory prerequisite would be rendered useless. The rest of section 47 U.S.C. § 155(c)(7) confirms this common sense observation by mandating that the time

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[15] The petitioners renew their argument that regardless of the availability of judicial review, an administrative agency cannot determine just compensation in the first instance. "The law of this circuit," however, "is 'emphatic' that only the Supreme Court or this court sitting *en banc* can judicially overrule a prior panel decision." *See Cargill v. Turpin,* 120 F.3d 1366, 1386 (11th Cir.1997).

[16] The statute states, "The filing of an application for review shall be a condition precedent to judicial review of any order, decision, report, or an action made or taken pursuant to a delegation under paragraph (1) of this subsection." "Paragraph (1)," referred to in the statutory text, empowers the Commission to delegate its functions to an "employee board or individual employee" and other entities. *See* 47 U.S.C. § 155(c)(1). This provision is the statutory basis for the Cable Bureau's authority to issue the first order in this case.

limit for filing a petition for review in the court of appeals must be computed "from the date upon which public notice is given of orders disposing of all applications for review filed in any case." *Id.* That is, the Commission must in some way act on the application for review before a party may petition a court of appeals for review. *See Richman Bros. Records Inc. v. FCC,* 124 F.3d 1302 (D.C.Cir.1997). In this case, both Gulf Power and APCo sought to bypass the full Commission by petitioning this court for review of the Cable Bureau's decision. Both petitions were therefore incurably premature—at least until the Commission finally reviewed APCo's petition. Accordingly, both of the initial petitions, nos. 00-14763 and 00-15068, are dismissed for failure to exhaust.

B.

The petition for review filed by Gulf Power is also defective because petitions for review may be filed only by parties to an agency proceeding. The Communications Act cross-references to the Hobbs Act, and so the latter governs the procedure for judicial review of FCC orders. *See* 47 U.S.C. § 402 ("Any proceeding to enjoin, set aside, annul, or suspend any order of the commission under this chapter . . . shall be brought as provided by and in the manner prescribed in [the Hobbs Act,] chapter 158 of Title 28."). That statute, in turn, provides that "[a]ny party aggrieved by the final order may . . . file a petition to review the order in the court of appeals where venue lies." 28 U.S.C. § 2344. A "party aggrieved" is one who participated in the agency proceeding. *See, e.g., Erie-Niagara Rail Steering Committee v. Surface Trans. Bd.,* 167 F.3d 111, 111-12 (2d Cir.1999); *See also In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.,* 799 F.2d 317, 334 (7th Cir.1986) ("The statute limits review to petitions filed by parties, and that is that."). Another statute confirms this conclusion. Under 28 U.S.C. § 2348, only parties to the agency proceeding can intervene as of right,

while intervention by a nonparty is discretionary. This statutory condition would be defeated if the nonparty could file its own petition for review as a matter of right. Accordingly, Gulf Power's initial petition for review in this case, no. 00-15068, must also be dismissed for lack of standing. The Commission's final order does not affect this conclusion.[17] This leaves us only with APCo's petition for review of the Order by the full Commission, no. 01-13058-a petition joined by various intervenors but not Gulf Power.

III.

The petitioners contend that the statute and regulations fail to provide just compensation in this case. Their argument stems from three critical observations. First, the Cable Rate fails to allocate to the attaching cable companies a pro rata share of the unusable portion of the pole. The unusable portion—the part of the pole that is below ground or is otherwise unavailable for attachment—is a capital expenditure that benefits the cable companies no less than APCo.[18] The unusable portion constitutes a vast majority of the pole and provides ground clearance that creates the requisite elevated corridor that is necessary for all attach-ments. Therefore, the petitioners argue, such expenditures should be allocated to the attaching entities equally. Second, the petitioners argue that the Cable Rate inappropriately uses backwards-looking "historical" costs rather than fair market value or replacement cost. Since pole-related expenditures are largely a function of labor costs, the present "cost" of a network of poles is much greater than it was when the

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[17] Gulf Power is interested in the outcome of this case only because of its potential effect as a precedent for its own pending case. We note that Gulf Power has not moved to intervene. We will therefore treat it as *amicus curiae* in the APCo petition, no. 01-13058.

[18] The regulated rate that telecommunications companies must pay, by contrast, includes the unusable portion of the pole. *See* 47 U.S.C. § 224(3).

network was first erected. Third, the Cable Rate does not allow the recovery of various expenditures that are properly attributable to pole attachments. Once these costs are taken into account, together with an appropriate adjustment that allocates part of the unusable portion of the pole to cable companies and a further adjustment that utilizes fair market value or replacement (rather than historical) cost,[19] the "just" rate would be an annual rent of over $47 per pole. Because $47 is a "conservative" estimate, and since petitioners seek only $38.81 per pole, it is argued that the drastically less rate of $7.47 fails to provide just compensation.

We review constitutional challenges to agency orders *de novo*. *Gulf Power II*, 208 F.3d 1263, 1271; *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1313 (D.C.Cir.1988). At first blush, the power companies appear to have a solid argument. The FCC inappropriately focused on ratemaking cases such as *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989). Cases like *Duquesne Light* stand for the proposition that rates can be regulated so long as they are not so "unjust" as to be confiscatory, and within this range the regulatory agency has broad discretion. *Id.* at 307, 109 S.Ct. at 616. When a physical taking is at issue, however, a different analytical hat must be worn. *See* 5 *Nichols on Eminent Domain* § 18.06[2], at 18-46 ("[T]raditional methods of valuation used in rate-making cases are not necessarily valid when eminent domain value is at issue."); *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.*, 912 F.2d 1262, 1314 n. 52 & 1319 (11th Cir.1990), *vacated*, 499 U.S. 915, 111 S.Ct. 1300, 113 L.Ed.2d 235 (1991) (Tjoflat, C.J., dissenting) ("Because the company acts under compulsion . . . rather than voluntarily submitting to regulation as in the ratemaking cases, the court

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[19] In the proceeding before the Cable Bureau, expert witnesses were used to generate assessments of "value" based upon market value, income capitalization, and replacement cost methodologies.

should apply a more rigorous standard for just compensation than the relatively broad 'zone of reasonableness' standard developed under *Hope.*"). The Supreme Court made this analytical distinction clear in *FCC v. Florida Power Corp.,* 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987), when the Court reversed this court for applying the traditional *Loretto* analysis rather than the "not confiscatory" standard. *Id.* at 253, 107 S.Ct. at 1113-14. As we have stated, this case *does,* in fact, trigger the *Loretto* analysis because of the element of compulsion in the 1996 Act.

In physical takings cases, the property owner generally must receive the "full monetary equivalent of the property taken." *United States v. Reynolds,* 397 U.S. 14, 16, 90 S.Ct. 803, 805, 25 L.Ed.2d 12 (1970). *See also United States v. Miller,* 317 U.S. 369, 373, 63 S.Ct. 276, 279, 87 L.Ed. 336 (1943) (just compensation requires "the full and perfect equivalent in money of the property taken."). The Supreme Court has remained steadfast in its resistance to a rigid rule for determining just compensation. *See, e.g., United States v. Commodities Trading Corp.,* 339 U.S. 121, 123, 70 S.Ct. 547, 549, 94 L.Ed. 707 (1950). Typically, fair market value is used. *Id.* Fair market value is established by determining "what a willing buyer would pay in cash to a willing seller" at the time of the taking. *Miller,* 317 U.S. at 374, 63 S.Ct. at 280. There is not an active, unregulated market for the use of "elevated communications corridors," however, and so an alternative to fair market value must be used. *Cf. General Motors v. United States,* 140 F.2d 873, 875 (7th Cir.1944) (discussing use of replacement cost and income capitalization approaches). The appropriate alternative, whatever that may be, rarely countenances the use of historical cost, as several Supreme Court cases make clear. *See Commodities Trading Corp.,* 339 U.S. at 130, 70 S.Ct. at 553; *United States v. Toronto, Hamilton & Buffalo Navigation Co.,* 338 U.S. 396, 403, 70 S.Ct. 217, 221-22, 94 L.Ed. 195 (1949). Therefore, APCo argues that any of its substitute methods--the "sales

comparison" approach, the "replacement cost" approach, or the "income capitalization" approach—should be used. Any of these, it argues, yield a much higher rate than the FCC presently allows. When a constitutionally acceptable cost methodology is combined with a more appropriate inclusion of costs (such as unusable pole space and various capital expenditures), the "full monetary equivalent of the property taken" exceeds the $38.81 rate APCo seeks. While we might ordinarily be sympathetic to this argument,[20] APCo's case is complicated by one known fact, one unknown fact, and one legal principle.

The known fact is that the Cable Rate requires the attaching cable company to pay for any "make-ready" costs and all other marginal costs (such as maintenance costs and the opportunity cost of capital devoted to make- ready and maintenance costs), in addition to some portion of the fully embedded cost. *See In the Matter of Ala. Cable Telecomm. Ass'n et al. v. Ala. Power Co.*, 16 FCC Rcd. 12,209, ¶ 69 n. 154 (2001). Indeed, such costs were paid in the present case.[21]

The legal principle is that in takings law, just compensation is determined by the loss to the person whose property is

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[20] Or maybe not. Arguably, this "as-applied" challenge flies in the face of our conclusion in *Gulf Power I* and *Gulf Power II* that the power companies failed to prove that there is no circumstance in which the rate would be constitutionally acceptable. That conclusion would seem to foreclose any argument based on the *methodology* of the formula--the crux of petitioners' argument in this case. The panel, however, may well have had in mind the general judicial aversion to facial challenges to rate orders, and it perhaps did not mean to preclude future challenges to the rate methodology in an as-applied context. *See Verizon Communications v. FCC*, 535 U.S. 467, 122 S.Ct. 1646, 1679-80, 152 L.Ed.2d 701 (2001) ("[T]he general rule is that any question about the constitutionality of ratesetting is raised by rates, not methods.").

[21] APCo received more than a million dollars in make-ready payments from cable company attachers.

taken. *United States v. Causby,* 328 U.S. 256, 261, 66 S.Ct. 1062, 1065-66, 90 L.Ed. 1206 (1946). Put differently, "[t]he question is, What has the owner lost? not, What has the taker gained?" *United States v. Virginia Elec. & Power Co.,* 365 U.S. 624, 635, 81 S.Ct. 784, 792, 5 L.Ed.2d 838 (1961) (citation omitted). This takings principle is a specific application of the general principle of the law of remedies: an aggrieved party should be put in as good a position as he was in before the wrong, but not better. *See generally* Dan B. Dobbs, *1 Law of Remedies 281* (1993). This legal principle, together with the fact that much more than marginal cost is paid under the Cable Rate, leads us to ask the following question: does marginal cost provide just compensation in this case?

This question exposes the unique nature of this case. Typically, the subject of a government condemnation proceeding is ordinary property, such as land. In such a case, the "value" of the thing taken is congruent with the loss to the owner, and there is therefore little tension between the legal propositions in *Virginia Electric* (loss to the owner, not gain to the taker) and *Reynolds* (full monetary equivalent of the property taken). This is because most property is rivalrous—its possession by one party results in a gain that precisely corresponds to the loss endured by the other party. In this case, however, the property that has been taken—space on a pole—may well lack this congruence. It may be, for practical purposes, *nonrivalrous.* This means that use by one entity does not necessarily diminish the use and enjoyment of others. A common example of a nonrivalrous good is national defense.

Suppose, for example, that a power company must, for its own "core" electric distribution activities, establish a network of poles that reaches one million feet into the sky. Further suppose that there is only one cable company in any one market that desires to attach to the power company's poles.

Finally, suppose that the government forces the power company to let the cable company attach to its pole network. What level of compensation is just? So long as the marginal cost of the attachment is paid, the power company incurs no lost opportunity or any other burden. That is, the cable company's use does not foreclose any other use. The pole space is, for practical purposes, nonrivalrous.

To this point APCo responds that the lost sale to the cable company—its opportunity cost—has also been taken. We think, however, that it is irrelevant whether the government keeps the condemned property for itself or appropriates it to another entity. That is, if the government ran its own monopoly cable company, it would not make sense for the power companies to say, "Even though we are not out any more money than we were before the taking, we are missing out on the opportunity to sell to the government at what we deem the 'full market price' of this pole space." *Cf. United States v. Cors,* 337 U.S. 325, 333, 69 S.Ct. 1086, 1091, 93 L.Ed. 1392 (1949) ("The special value to the condemner as distinguished from others who may or may not possess the power to condemn has long been excluded as an element of market value."). It should not make a difference if the government chooses to allocate the condemned property to private companies.

In some cases, then, marginal cost will be sufficient to compensate the pole owner. A similar conclusion was reached in *Metropolitan Transp. Auth. v. ICC,* 792 F.2d 287 (2d Cir.1986). In that case, Amtrak was given the power to force its way onto the tracks of other railroad companies. The ICC had authority to decide the compensation Amtrak would pay, with the constraint that such compensation was to be limited to "incremental costs." The Second Circuit concluded:

> [A]ssuming arguendo that there has been a taking, compensation is adequate since MTA, in obtaining avoidable costs, will receive what it would have had but

> for the taking. In other words, the owner, there the lessee of the railroad facilities, will be put into the same position monetarily as it would have occupied if the property had not been taken, and this is precisely the guiding principle of what is just compensation . . . . If the Fifth Amendment required such a sharing [of the overhead costs of ownership, then the petitioners] would be put in a better position by Amtrak's appearance on the scene. True, Amtrak benefits. But if we know one immutable principle in the law of just compensation, it is that the value to the taker is not to be considered, only loss to the owner is to be valued.[22]

*Id.* at 297.

*Metropolitan Transportation* involved something close to a nonrivalrous good. Allowing traffic from one railroad rarely means that another railroad is precluded from traveling on the same line unless, of course, the line is already crowded. The possibility of crowding is perhaps more likely in the context of pole space, however, and if crowded, the pole space becomes rivalrous. Indeed, Congress contemplated a scenario in which poles would reach full capacity when it created a statutory exception to the forced-attachment regime. 47 U.S.C. § 224(f)(2). When a pole is full and another entity wants to attach, the government taking forecloses an opportunity to sell space to another bidding firm—a missed opportunity that does not exist in the nonrivalrous scenario. By forcing the power company to rent space that could be occupied by another firm (or put to use by the power company itself), the analogy to land becomes more appropriate. In the "full capacity" situation, it is the zero-sum nature of pole space, like land, that is key. This leads us to the important unknown fact: nowhere in the record did APCo allege that APCo's network of poles is currently crowded. It

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[22] Notably, the court did not take the flawed analytical step of focusing on the track owner's lost opportunity to charge Amtrak "market" rates.

therefore had no claim. *See United States v. John J. Felin & Co.*, 334 U.S. 624, 641, 68 S.Ct. 1238, 1246, 92 L.Ed. 1614 (1948) (holding that the burden of proving loss, as well as the amount of any loss, is upon the party claiming to have experienced a taking).

In short, before a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation. While this analysis may create what appears to be an anomaly—a power company whose poles are not "full" can charge only the regulated rate (so long as that rate is above marginal cost), but a power company whose poles are, in fact, full can seek just compensation--this result is in accordance with the economic reality that there is no "lost opportunity" foreclosed by the government unless the two factors are present.[23]

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[23] Since marginal cost provides just compensation so long as these factors are absent, it is irrelevant that the Telecom Rate provided in 47 U.S.C. § 224(e) yields a higher rate for telecommunications attachments than the Cable Rate provides for cable attachments. The FCC reached a perfectly logical conclusion when it observed: Congress' decision to choose a slightly different rate methodology, more suited in its opinion to telecommunications service providers, does not call into question the constitutionality of the cable rate formula . . . because both formulas provide just compensation under the Fifth Amendment . . . . Congress used its legislative discretion in determining that cable and telecommunications attachers should pay different rates. *In the Matter of Ala. Cable Telecomm. Ass'n,* 16 FCC Rcd. 12,209, ¶ 49.

IV.

A.

APCo contends that regardless of how we ultimately rule on the merits, the FCC's decision is "arbitrary and capricious" and therefore must be set aside under 5 U.S.C. § 706. The policy decisions of agencies must be set aside if they are not the product of reasoned decisionmaking. Courts are deferential to agency decisions and will not upset them merely because they disagree with the policy choice of the agency. *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971). In short, the court "must not . . . substitute [its] judgment for that of the agency . . . but rather determine whether there was a rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 245-46, 9 L.Ed.2d 207 (1962).

We are unconvinced that the FCC's decision was arbitrary and capricious. APCo argues that the FCC's misguided references to *Duquesne Light* and other ratemaking cases, combined with its refusal to engage in detailed consideration of APCo's evidence on the just compensation issue, evinces unreasoned decisionmaking. The FCC did, however, note that reimbursement of marginal cost was tantamount to just compensation in this case. *See In the Matter of Ala. Cable Telecomm. Ass'n et al. v. Ala. Power Co.,* 16 FCC Rcd. 12,209 ¶ 52 (2001). Therefore, it was not obliged to engage in detailed analysis of expert testimony concerning the value proxies proffered by the petitioners' experts, which were irrelevant given the sufficiency of marginal cost. To be sure, the Cable Bureau and the full Commission might have been advised to inquire about the level of capacity presently on APCo's poles. But we can hardly fault the Commission for ignoring an issue that APCo never raised.

Finally, we note that APCo does not contend that the FCC decision was arbitrary and capricious in its policy determination; its concern is only with the FCC's constitutional analysis. Accordingly, we do not address the policy-based defenses raised by the FCC.[24]

B.

APCo asserts that the Commission's pole attachment complaint proceeding is defective because "if and when" they are ultimately successful in their claim that they are entitled to more than the statutory rate, "there may not be any process that will compensate APCo retroactively," because the FCC "apparently lacks the statutory authority to order a cable company to retroactively pay a charge higher than the statutory maximum." This argument posits a mere hypothetical. APCo has not demonstrated that in this case the Commission's procedures failed to provide it with adequate compensation, and so resolution of its claim must await another day. Moreover, this court explained in *Gulf Power I* that if a court were to find an FCC order to be insufficient, Section 224 permits the court to direct the FCC to issue a rate order providing that a utility receive the just compensation rate from the date it was first required to provide access under the mandatory access provision [and thereby] ensure a utility receives just compensation both prospectively and in the period prior to the court's determination of the just compensation rate. *Gulf Power I,* 187 F.3d at 1335.

C.

APCo also contends that the FCC's complaint process violated its Fifth Amendment due process rights because "pole complaints normally are to be adjudicated on the basis

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[24] We do not reach, for example, the question as to whether a hypothetical determination by the FCC to set the rate at marginal cost would be an "arbitrary and capricious" one, even if marginal cost would provide just compensation for Fifth Amendment purposes.

of the pleadings, without the opportunity for a hearing." Like the first procedural claim, this claim fails because it is based on a general observation rather than a real-life injury. The Commission's rules state that "[t]he Commission may decide each complaint upon the filings and information before it . . . or may, in its discretion, order evidentiary procedures upon any issues it finds to have been raised by the filings." 47 C.F.R. § 1.1411. APCo must therefore identify a material question of fact that warrants a hearing. But its dispute is only over the *methodology* that should be used to calculate the level of just compensation—a legal issue that hardly warrants an evidentiary hearing since no material facts are disputed. *See Mathews v. Eldridge,* 424 U.S. 319, 321, 96 S.Ct. 893, 896, 47 L.Ed.2d 18 (1976) (requiring that before a court concludes that there has been a due process violation, there must be a private interest affected). For example, if APCo and the cable companies were to later disagree about whether a pole network is operating at full capacity, the FCC may commit a due process violation if it were to adopt the cable companies' position without an evidentiary hearing. That day, however, has not yet arrived.

V.

It is well settled that if the government commits a taking, it is under an obligation to put the aggrieved party in the position it was in before the taking occurred (and no better). In unique cases such as this one, marginal cost meets this test—unless, of course, the aggrieved party proves lost opportunity by showing (1) full capacity and (2) a higher valued use. APCo never alleged these facts. Therefore, its challenges based on the Fifth Amendment and the Administrative Procedure Act must fail, and its petition for review is denied.

SO ORDERED.

## APPENDIX B

FEDERAL COMMUNICATIONS COMMISSION
(F.C.C.)

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Application for Review
File No. PA 00-003

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In the Matter of ALABAMA CABLE TELECOMMUNICATIONS ASSOC., COMCAST CABLEVISION OF DOTHAN, INC., *et al.*,
*Complainant*,

v.

ALABAMA POWER COMPANY,
*Respondent/Applicant.*

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FCC 01-181
Adopted: May 23, 2001
Released: May 25, 2001

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### ORDER

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement.

### I. INTRODUCTION

1. Before the Commission is an application for review ("Application"), filed by Respondent on September 11, 2000, of an Order released by the Cable Services Bureau ("Bureau") under delegated authority.[1] The Order, DA 00-2078 ("Bureau Order"),[2] granted in part Complainant's pole

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[1] A listing of the documents filed in this matter and reviewed by the Commission is attached as an exhibit to this order.

[2] In the Matter of *Alabama Cable Telecommunications Assoc., et al. v. Alabama Power Company*, PA 00-003, DA 00-2078, 15 FCC Rcd 17346 (released September 8, 2000).

attachment complaint ("Complaint") filed pursuant to Section 224 of the Communications Act of 1934, as amended ("Pole Attachment Act")[3] and Subpart J of the Commission's Rules.[4] The Bureau Order found Respondent's proposed annual pole attachment rate of $38.81 to be unreasonable pursuant to the Pole Attachment Act and the Commission's rules. The Bureau Order required Respondent to allow the Complainant to continue to remain attached to Respondent's poles at the current annual negotiated rate of $7.47 per pole, pending the satisfactory negotiation of a new agreement. The parties were ordered to negotiate a new agreement in good faith using the Commission's cable pole attachment rate formula as a guide to establishing a reasonable rate. Respondent was also ordered to refund amounts charged over the $7.47 rate. Along with its Application, Respondent filed an emergency petition for stay of the Bureau Order pending judicial review ("Petition"). In this order we deny Respondent's Application and Petition.

## II. BACKGROUND

2. Pursuant to the Pole Attachment Act, the Commission has the authority to regulate the rates, terms, and conditions for attachments by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. The Commission shall provide that such rates, terms and conditions are just and reasonable.[5] The Pole Attachment Act grants the Commission general authority to regulate such rates, terms and conditions, except where such matters are regulated by a State.[6] The

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[3] 47 U.S.C. § 224.

[4] 47 C.F.R. §§ 1.1401-1.1418.

[5] 47 U.S.C. § 224 (b) (1).

[6] 47 U.S.C. § 224(b)(1) and (2). Alabama has not certified that it regulates rates, terms and conditions of pole attachments. See Public Notice, "*States That Have Certified That They Regulate Pole Attachments*," DA 92-201, 7 FCC Rcd 1498 (1992).

Commission is authorized to adopt procedures necessary to hear and to resolve complaints concerning such rates, terms, and conditions.[7] The Commission has developed a formula methodology to determine the maximum allowable pole attachment rate.[8] The Telecommunications Act of 1996 ("1996 Act"),[9] expanded the scope of Section 224 by applying the pole attachment rate formula to rates for pole attachments made by telecommunications carriers [10] in addition to cable systems,[11] until a separate methodology [12] became effective for telecommunications carriers after February 8, 2001.[13] Because the instant complaint concerns pole attachment rates in effect prior to February 8, 2001, we apply the cable attachment formula ("Cable Formula").[14] A utility must charge a pole attachment rate that does not exceed the maximum amount permitted by the Cable Formula. We have concluded that "where onerous terms or conditions are found

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[7] 47 U.S.C. § 224(b)(1).

[8] *See* Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order, 68 FCC 2d 1585 (1978); Second Report and Order, 72 FCC 2d 59 (1979); Memorandum and Order, 77 FCC 2d 187 (1980), *aff'd, Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (*per curiam*); and Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4387 (1987). *See also*, Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd 6777 (1998) and Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 (2000)

[9] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[10] 47 U.S.C. § 153(44).

[11] 47 U.S.C. § 153(8); 47 U.S.C. § 602(5).

[12] *See* Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd 6777 at ¶¶ 116-130 (1998).

[13] *See* 47 U.S.C. § 224(d)(3) and 47 U.S.C. § 224(e)(4).

[14] *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 at ¶ 5 (2000).

to exist on the basis of the evidence, a cable company may be entitled to a rate adjustment or the term or condition may be invalidated."[15]

3. The Pole Attachment Act, as amended by the 1996 Act, imposes upon all utilities, the duty to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[16] This directive ensures that "no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields."[17] The mandatory access provision added by the 1996 Act was addressed by the Eleventh Circuit Court of Appeals in *Gulf Power I*,[18] which held that the 1996 Act's mandatory access amendment to the Pole Attachment Act effected a taking of property, but that there is an adequate process for obtaining just compensation. In *Gulf Power II*,[19] the Court addressed the constitutionality of the Commission's regulations implementing the 1996 Act amendments and found that the regulations also authorize a taking of property. The Court

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[15] Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Order and Opinion on Reconsideration, 4 FCC Rcd 468 at ¶ 25 (1989).

[16] 47 U.S.C. § 224 (f) (1).

[17] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 at ¶ 1123 (1996). *See also* Local Competition Reconsideration Order, In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996, Order on Reconsideration, FCC 99-266 (released October 26, 1999).

[18] *Gulf Power v. United States*, 187 F.3d 1324 (1999).

[19] *Gulf Power v. FCC*, 208 F.3d 1263 (2000), stayed pending Supreme Court review; petition for cert. granted January 22, 2001.

reserved on the issue of whether the regulations provide just compensation under the Fifth Amendment to the Constitution, stating that the issue was not ripe for review.[20]

4. Subpart J of the Commission's rules[21] sets out a scheme for an aggrieved party to seek recourse to the Commission after negotiations with a utility have failed. In addition to other requirements, a pole attachment complaint must state with specificity the pole attachment rate that is claimed to be unjust or unreasonable.[22] A complaint must include specific information supporting the complainant's allegation that the pole attachment rate is unreasonable but will not be dismissed if the utility has failed to provide the information.[23] If it has not already done so, a utility shall provide the required information in response to the complaint.[24] This information includes all of the supporting information necessary to a calculation of the maximum pole attachment rate allowed under the Pole Attachment Act, using the Cable Formula, and the supporting pages from the utility's Federal Energy Regulatory Commission ("FERC") Form 1.[25]

## III. BUREAU ACTION

5. The Bureau Order concluded that the parties to the Complaint were engaged in an approximately 20 year relationship, during which time Complainant's attachments to Respondent's poles were governed by agreements which provided for Complainant to pay an annual pole attachment fee

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[20] *Id.* at 1272-73.

[21] 47 C.F.R. §§ 1.1401-1.1418.

[22] 47 C.F.R. § 1.1404 (e).

[23] 47 C.F.R. § 1.1404 (k).

[24] *Id.*

[25] *Id. See also* 18 C.F.R. Part 101 for a list and description of the FERC accounts.

to Respondent. For a number of years prior to the Complaint, the parties' used the Commission's Cable Formula as the basis for negotiating this rate. For the year beginning July 1999 through June 2000, Complainant was charged an annual pole attachment rate of $7.47 per pole. Complainant did not challenge that rate. In June of 2000, Respondent announced that it was rescinding all existing agreements and requested Complainant to enter into new agreements with an annual rate of $38.81 instead of $7.47. Complainant responded by filing this Complaint. In order to calculate a reasonable pole attachment rate when the parties to a pole attachment agreement cannot negotiate a reasonable rate, the Commission applies the Cable Formula using public data when available. In this case, both parties submitted pole attachment rate calculations that drew similar conclusions, but neither calculation resulted in an increase above the last rate agreed to by the parties, $7.47.

6. The Bureau Order also concluded that Respondent did not attempt to justify its proposed $38.81 rate using the Cable Formula. Instead, the Respondent argued that the Complaint should be dismissed for lack of jurisdiction and second, that the Cable Formula does not provide just compensation and the Bureau should substitute a different methodology for determining the maximum permitted rate. The Bureau denied Respondent's motion to dismiss and Respondent's arguments in favor of a different methodology. The Bureau Order concluded that the Cable Formula has provided a stable and certain regulatory framework, that may be applied simply and expeditiously requiring "a minimum of staff, paperwork and procedures consistent with fair and efficient regulation." [26]

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[26] *See* S. Rep. No. 95-580, 95th Cong., 1st Sess. at 21 (1977) (stating that it was the desire of the drafters "that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation").

Indeed, the Bureau Order noted that Congress did not believe that special accounting measures or studies would be necessary because most cost and expense items attributable to utility pole, duct and conduit plant were already established and reported to various regulatory bodies, in this case, to the Federal Energy Regulatory Commission.[27] The Bureau Order further noted that the United States Supreme Court has upheld the Cable Formula for calculating pole attachment rates.[28]

7. The Bureau Order concluded that the Commission's rules governing pole attachment rates are directly derived from the Pole Attachment Act and that a utility is compensated in full for any make-ready or change-out costs associated with the attachment.[29] The Bureau Order further concluded that the Cable Formula used to calculate an annual pole attachment rate allows a utility full recovery of its costs associated with the space used for the attachment as well as a return on investment and provides just compensation to the utility for the space occupied on the pole.

## IV. APPLICATION FOR REVIEW

### A. Jurisdiction over attachments that provide high-speed access to the Internet

#### 1. Respondent's position

8. Respondent argues first that the entire proceeding should be dismissed because the Complainant provides Internet services and therefore the Commission does not have jurisdiction over the charges for their pole attachments

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[27] *Id.*

[28] *FCC v. Florida Power Corporation*, 480 U.S. 245 (1987).

[29] "Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. A pole "change-out" is the replacement of a pole to accommodate additional users.

pursuant to *Gulf Power II*. Respondent alleges that the Bureau ignored the *Gulf Power II* decision because no mandate was issued in that proceeding. Respondent argues that this action is inexplicable and unlawful because the Eleventh Circuit rules state that the "issuance or non-issuance of the mandate" has no impact on the binding nature of a published decision, citing the Eleventh Circuit Internal Operating Procedures associated with *Federal Rule of Appellate Procedure 36* and the cases cited therein. Respondent argues that a stay of the mandate is irrelevant. Respondent claims that the Bureau's decision is made more egregious due to the fact that the Commission and Respondent were both parties to the *Gulf Power II* decision.

2. Complainant's position

9. Complainant responds that the Bureau was correct in finding that the decision in *Gulf Power II*, regarding the Pole Attachment Act's application to cable attachments that are commingled with Internet services, was not final and did not require dismissal of the Complaint. Complainant argues that, as the Bureau pointed out, further litigation is in progress over that question. Complainant further points out that the Courts in both *Gulf Power I* and *Gulf Power II*, found the Commission's jurisdiction to preserve physical access to poles to be constitutional, both before the 1996 Act, for voluntarily negotiated attachments and after the 1996 Act, for attachments made pursuant to the mandatory access requirements of the Pole Attachment Act.[30] Complainant also argues that its current pole attachment arrangements are the product of negotiated access conducted prior to 1996 and the Commission has continuing jurisdiction to require Respondent to maintain reasonable rates, terms and conditions with respect to pole attachments entered into before the 1996 Act. Complainant asserts that Respondent's argument to the contrary is

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[30] Citing *Gulf Power I* at 1333-1336.

inconsistent with both the Supreme Court's decision in *FCC v. Florida Power Corp.*[31] ("*Florida Power*") and with *Gulf Power I* and *II*.

10. Complainant continues that Respondent's attempts to jettison the Commission's jurisdiction over cable pole attachments and exact monopoly rents is premature because the *Gulf Power II* decision, even assuming it were correct, is not yet final. Complainant argues that the decision has been stayed since its inception, first due to the pending petitions for rehearing and/or rehearing en banc and subsequently through a stay pending the filing of a petition for certiorari with the United States Supreme Court.[32] Complainant also argues that Respondent's case appears premised on its claim that the potential to provide Internet divests the FCC from any authority over all of these attachments. Complainant responds that a well-built cable system has the potential for carrying communications services yet unborn but that potential does not remove it from the scope of the Pole Attachment Act. Finally, Complainant argues that, even if *Gulf Power II* were final and correct, Respondent has made no showing that "Internet" will be provided over every Alabama attachment to every customer.

3. Discussion

11. We find that the Bureau did not ignore the *Gulf Power II* decision but instead made a reasoned decision not to dismiss the Complaint because the *Gulf Power II* mandate was stayed by the Court. The cases cited in the Eleventh Circuit Internal Operating Procedures and by Respondent are not applicable to the instant case. *Martin v. Singletary*,[33]

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[31] 480 U.S. 245 (1987).

[32] Because that petition was granted on January 22, 2001, the stay is effective until the case is decided by the Supreme Court.

[33] 965 F.2d 944 (11th Cir. 1992).

involved a convicted murderer's third petition for federal habeas relief. In rejecting the petition for relief, the court found that petitioner failed to meet a test of "actual innocence" established by a previous court decision. Although that previous decision was stayed, the court applied the same test of "actual innocence." The Court elucidated however, that "[a] mandate is the official means of communicating our judgment to the district court and of returning jurisdiction in a case to the district court. The stay of the mandate in [the previous court decision] merely delays the return of jurisdiction to the district court to carry out our judgment in that case." [34] Similarly, in *Vo Van Chau v. Department of State*,[35] cited by Respondents, the question arose in the context of a motion for preliminary injunction. In evaluating whether a party was likely to succeed on the merits of its case, the court looked to a previous decision for guidance. Even though the mandate for that previous decision had not issued, the court was guided by that decision in its determination of the likelihood of success of the case before it.

12. The instant case is quite distinguishable from those two examples. As Respondent points out, the Commission is a party to the *Gulf Power II* decision. The Commission requested and was granted a stay pending review by the Supreme Court. In requesting a stay, the Commission pointed out that an immediate issuance of the mandate would cause premature and perhaps unnecessary disruption in major segments of the cable industry, and it could threaten the deployment of affordable high-speed Internet access for many American consumers. In contrast, the Commission explained, maintaining the longstanding status quo for several additional months would not cause substantial harm to the parties. The request for a stay was granted and the result is to preserve the

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[34] *Id.* at 945, n.1.

[35] 891 F. Supp. 650 (D.D.C. 1995).

regulatory status quo. In fact, that is the very purpose of the stay, to preserve the status quo pending final action by the Supreme Court.[36] The Respondent is the party seeking to upset the status quo by raising its pole attachment rates and ignoring the Commission's regulations for calculating reasonable rates. The Bureau merely applied the Commission's rules which, in conformance with the Eleventh Circuit's grant of a stay of the mandate in *Gulf Power II*, remain in effect pending Supreme Court review, and which preserve the same standard that has been applied for over twenty years and was approved by the Supreme Court in Florida Power. We will affirm the Bureau's decision not to dismiss the Complaint for lack of jurisdiction based on *Gulf Power II*.[37]

B. Jurisdiction over the rates, terms and conditions of mandatory nondiscriminatory access

1. Respondent's position

13. Respondent argues that the proceedings should be dismissed because the circumstances surrounding Respondent's termination of the pole attachment agreements with Complainant and the rate increase involve only a breach of contract claim and the Commission does not have jurisdiction over such claims. Respondent argues that the Bureau Order nullifies Respondent's contractual right to terminate its existing agreements. Respondent believes that the Bureau

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[36] *Commodity Futures Trading Commission, et al. v. British American Commodity Options Corp., et al.*, 434 U.S. 1316, 1319, 98 S.Ct. 10, 12 (1977). *See also, Algonquin Gas Transmission Co. v. Township of Bernards in Somerset County*, 112 F.Supp. 86, 91 (1953) ("The effect of stay of mandate by the United States Court of Appeals is to continue the status quo for period specified in stay.")

[37] We note that the regulatory status of cable Internet access is the subject of an ongoing Notice of Inquiry, Inquiry Concerning High-Speed Access to the Internet over Cable and other Facilities, FCC 00-355 (released September 28, 2000).

accepted an argument made by the Complainant that a "course of dealing" had superseded the parties' mutual right to terminate the contracts. Respondent cites Commission decisions that delineate the Commission's jurisdiction. For example, Respondent quotes *Marcus Cable Associates v. Texas Utilities* [38] ("Marcus Cable"), where the Commission held that its authority over pole attachments does not "supplant that of the local jurisdiction when the issue between the parties is a breach of contract not involving unjust or unreasonable contractual rates, terms, or conditions. Consequently, the threshold question before us is whether the issues raised in the Complaint concern a breach of contract not involving unjust and unreasonable contractual rates, terms and conditions." [39] Respondent concludes that this precedent establishes that the instant proceeding should be dismissed.

2. Complainant's position

14. Complainant answers that Respondent's sudden termination of Complainant's pole attachment contracts and its attempt to unilaterally impose a new contract with an annual attachment rate of $38.81 per pole, more than 500 percent higher than existing pole attachment rates, violated the Commission's rules requiring negotiation in good faith, and prevention of unjust and unreasonable pole attachment rates, terms and conditions. Complainant argues that, despite Respondent's attempts to depict this dispute as one involving only the enforcement of legitimate contract rights, Respondent departed from a long established course of dealing over pole attachment amendments in order to apply a termination clause as a coercive mechanism for demanding that Complainant sign a new, one-sided pole agreement with a more than 500 percent rate increase. Complainant claims that

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[38] In the *Matter of Marcus Cable Associates, LP v. Texas Utilities Electric Co.*, 12 FCC Rcd 10362 (1997).

[39] *Id.* at ¶ 10 (footnote omitted).

Respondent's implied threat to interrupt Complainant's business should Complainant fail to acquiesce to Respondent's unilateral demands, and Respondent's unwillingness to negotiate at all were violations of the Commission's established requirement that utilities must negotiate all pole attachment agreements in good faith. Complainant states that in the past two decades, when one party, usually the utility, has given notice of an intent to terminate, despite contractual language purporting to require the removal of Complainant's cables and wires from the utility's poles, the parties have agreed that Complainant's facilities may remain on the poles during the conduct of good faith negotiations towards a new pole agreement.

15. Complainant also argues that Respondent's termination of Complainant's pole attachment contracts would cause irreparable harm. Complainant asserts that if unilaterally imposed contracts are not accepted, the termination of existing contracts would remove the provisions which currently govern all of the day-to-day matters involving pole attachments, including matters relating to construction, modification, rights-of-way, transfers, inspections, damage and indemnification, safety, and other technical and engineering issues, imposing enormous uncertainty and substantial technical and financial risks upon Complainant during their conduct of daily operations, including installations, repairs, upgrades, and rebuilds. Complainant states that it cannot reasonably reproduce a substitute facility for Respondent's poles or move facilities underground.

16. Complainant continues that payment of the $38.81 rate pending final resolution would substantially limit its ability to offer new services such as digital cable service, expanded video service, and advanced telecommunications service. Complainant asserts that most smaller operators do not have the capital resources to cover such a large increase in operating expenses, and it is uncertain whether the necessary

funds could be obtained from lenders. Complainant also argues that cable operators would not be likely to recover the increase in pole rents through subscriber charges because of competitive market conditions, including competition from DBS dishes that Respondent sells. Complainant also asserts that the magnitude of Respondent's pole rate increase is likely to lead some small cable operators to go out of business and prevent, delay or make economically infeasible Complainant's rebuilds and other services to the public and public entities, including schools, libraries, and government facilities.

17. Complainant concludes that the Commission has jurisdiction over these matters and the authority to remedy abuses. Complainant also cites Marcus Cable for the proposition that "the Commission's jurisdiction encompasses certain practices growing out of a contractual relationship between a utility and a cable operator . . .".[40] Complainant cites additional cases supporting the Commission's jurisdiction over all complaints involving the rates, terms and conditions of pole attachments.[41] Finally, Complainant asserts that the law is clear that Respondent may not create new rents or contract terms by unilateral amendment to existing contractual arrangements and then immunize its actions from Commission scrutiny.[42] Complainant also compares Respondent's

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[40] *Id.* at 10366.

[41] Complainant cites the following cases: *Mile Hi Cable Partners, L.P. v. Public Service Company of Colorado*, 14 FCC Rcd 3244 (1999); *Public Service Co. of Colorado v. Mile Hi Cable Partners L.P.*, No. 98CA1666, 1999 Colo. App. LEXIS 334 (Ct. App. Dec. 23, 1999); and *Texas Utilities Electric Co. v. Heritage Communications, Inc.*, CA 3-89-3080-R (N.D. Tex. June 22, 1990).

[42] In support if its assertion, Complainant cites Second Report & Order in Docket 78-144, 72 F.C.C.2d 59, 67 (1979), *aff'd, Monongahela Power Company v. FCC*, 655 F.2d 1254 (1981); *Capital Cities Cable, Inc. v. Southwestern Public Service Co.* PA-85-0005, Mimeo No. 5431 (June 28, 1985), *recon. denied*, PA-85-0005, Mimeo No. 6957 (September 13,

duty to negotiate in good faith under the Pole Attachment Act and the Commission's rules,[43] with broadcast stations' obligation to negotiate retransmission consent agreements in good faith under the Satellite Home Viewer Improvement Act of 1999,[44] concluding that the Bureau Order properly imposed a bargaining order on Respondent pursuant to its statutory authority to ensure that the rates, terms and conditions of attachments remain just and reasonable.

3. Discussion

18. As noted above, pursuant to the Pole Attachment Act, the Commission has the authority to regulate the rates, terms, and conditions for attachments by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility to insure that such rates, terms and conditions are just and reasonable.[45] Where onerous terms or conditions are found to exist, we may adjust rates or invalidate the term or condition.[46]

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1985); *TCA Management Co. v. Southwestern Public Service Company*, 10 FCC Rcd. 11832 (1995) at ¶¶ 14-15 (citing *Monongahela Power Co. v. FCC*, 655 F.2d 1254, 1257 (D.C. Cir. 1981) (*per curiam*); *Capital Cities v. SPS, supra*, slip. op. at 2, ¶ 4; *Gulfstream Cablevision of Pinellas County, Inc. v. Florida Power Corp.*, PA 84-0016, Mimeo 35810, slip. op. at 2, ¶ 4 (released May 17, 1985); *TeleCable Development Corp. v. Appalachian Power Co.*, PA 79-0007, Mimeo 889, slip. op. at 3 (Com. Car. Bur. released Oct. 31, 1980).

[43] Citing Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd. 468 (1989) at ¶ 39; Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Report and Order, 2 FCC Rcd. 4387 at n.51 (1987).

[44] Citing Implementation of the Satellite Home Viewer Improvement Act of 1999, 15 FCC Rcd 5445 at 40-43 (released March 16, 2000).

[45] 47 U.S.C. § 224(b)(1).

[46] Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Order and Opinion on Reconsideration, 4 FCC Rcd 468 at ¶ 25 (1989).

Frequently, respondents to complaints will argue that the complaint is not really about the rates, terms and conditions of access but instead is merely a matter of breach of contract more suitable for another forum. Although certain remedies for breach of contract may be pursued in forums other than the Commission, the Commission has primary jurisdiction over issues about the reasonableness of rates, terms and conditions concerning pole attachments.[47]

19. We would be hard pressed to find a set of circumstances that falls more within the Commission's jurisdiction than the circumstances of this case. In this matter, the issue is not whether the Complainant failed to pay its invoice, or rearranged attachments in violation of an agreement negotiated in conformance with the Commission's rules and the Pole Attachment Act, but whether Respondent's unilateral rate increases, with the concomitant threat to dislodge Complainant's attachments with the express purpose to make Complainant assert its mandatory right to access,[48] constitute unjust and unreasonable rates, terms or conditions. Every allegation contained in the complaint involves the rates, terms and conditions of access to Respondent's poles. The Bureau's decision, to order Respondent to allow the Complainant to continue to remain attached to the poles pending the negotiation of a rate in accordance with the Commission's formula, is well within the Commission's jurisdiction to enforce the access provisions of the Pole Attachment Act as well as the Commission's jurisdiction to ensure that conditions of pole attachment agreements are just and reasonable.

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[47] *See*, for example, In the Matter of *Mile Hi Cable Partners, et al. v. Public Service Company of Colorado*, 14 FCC *Rcd* 3244 (1999) at ¶ 12.

[48] Respondent's June 8, 2000 letters to Complainant state that "If Attachee should desire to keep its facilities on APCO's poles, then Attachee must exercise its right of mandatory access."

20. The Bureau also concluded that, under these circumstances, an attacher that is already attached to a utility's poles is not required to file a complaint for access under the Commission's rules in order to remain on the pole pursuant to the mandatory access provisions of the Pole Attachment Act.[49] This is because there are no preliminary access issues, such as insufficient capacity or safety considerations,[50] to be determined if an attacher is already on the pole. Requiring an attacher to utilize the complaint process to gain mandatory access when it is already attached to the pole would be an inefficient waste of the parties' and the Commission's resources. However, the larger issue is whether all voluntary relationships become mandatory pursuant to the 1996 Act's mandatory access amendments to the Pole Attachment Act. While the mandatory access provisions of the Pole Attachment Act could arguably be construed as directed to new entrants attempting to gain access to crowded poles, the language of the Pole Attachment Act does not draw a distinction between old and new attachers. This issue is only relevant if the *Gulf Power I* and *Gulf Power II* decisions, which held that the mandatory access provisions of the Pole Attachment Act and the Commission's regulations implementing the Pole Attachment Act authorize a taking, are found to impose a different standard of compensation for mandatory as opposed to voluntary relationships.

21. Because a pole owner generally may, at some point, pursuant to a negotiated agreement, terminate its voluntary relationship with an attacher under reasonable terms and conditions, we cannot support a finding that voluntary relationships are "grandfathered" under the Pole Attachment Act as

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[49] The pertinent provision of the Pole Attachment Act states that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of- way owned or controlled by it." 224 U.S.C. § 224(f)(1).

[50] *See* 224 U.S.C. § 224(f)(2).

perpetual voluntary relationships. We believe that any constitutional challenge to the Commission's rate formula will be analyzed by a court pursuant to *Gulf Power I* and *Gulf Power II* as if the attachment at issue was mandatory under the Pole Attachment Act, whether or not the attacher enjoyed an existing voluntary relationship at the time of the 1996 Act amendments to the Pole Attachment Act. However, as more fully explained below, the Pole Attachment Act and the Commission's rules implementing the Pole Attachment Act, including the Commission's formula for calculating just and reasonable pole attachment rates, satisfy the constitutional requirement of just compensation for the taking of property under the Fifth Amendment to the U.S. Constitution, whether or not the relationship between attacher and utility is voluntary or mandatory.

C. The requirement of due process and request for stay

1. Respondent's position

22. Respondent argues that the Bureau Order effects an unconstitutional taking because the Commission does not provide a reasonable, certain, and adequate process for obtaining just compensation. Respondent claims that in *Gulf Power I*, the Commission committed to the Eleventh Circuit that it would stay any of its orders that would lower a pole attachment charge below that which the pole owner deems to be just compensation until that order is reviewed by a court. Respondent asserts that this policy would allow a utility to have judicial review of the Commission's determination of just compensation prior to being forced to provide access to its property. Respondent argues that such a commitment is necessary to ensure that a reasonable, certain, and adequate provision for obtaining just compensation exists at the time of the taking. Respondent claims that the Commission is now acting in contravention of this express policy.

23. Respondent argues that the holding in *Gulf Power I*, that judicial review of any Commission rate determination would "ensure that the utility is not required to provide access to its property at a rate that does not provide just compensation," [51] is premised on the understanding that Respondent would not be required to provide access to its facilities for a fee less than what Respondent deemed to be just compensation until a judicial determination of just compensation was made. Respondent supports its argument with the claim that in answer to a question posed by the Court in *Gulf Power I*, "[d]oes 47 U.S.C. section 224, or any regulation issued pursuant to that provision, require a utility to provide access to its poles, ducts, conduits, or rights-of-way at a rate below which the utility considers to be just compensation at any time prior to a court determining the just compensation for that access?",[52] the Commission (through the Department of Justice) replied that a pole owner would not be required to provide access at a rate below what the owner considers to be just compensation until judicial review is made because the Commission would stay the operation of any of its orders that might attempt to reduce that charge. Respondent claims that the *Gulf Power I* decision was predicated upon these representations made by the Commission. Respondent relies on this same argument in support of its petition for emergency stay.

24. Respondent claims that it is time for the respective parties to pole attachment agreements to end the complaint process before the Commission and have the courts review the just compensation requirements arising from the taking effectuated by the mandatory access provision. In order to accomplish this and allow the judicial process to work,

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[51] Citing *Gulf Power Co. et al. v. United States*, 187 F.3d 1324, 1338 (11th Cir. 1999).

[52] *See* letter dated March 29, 1999 to Clerk, United States Court of Appeals for the Eleventh Circuit from the U.S. Department of Justice.

Respondent argues that the Commission should stay the effects of the Bureau Order pending judicial review. Respondent also claims that fundamental principles of fairness and equity require the Commission to stay the Bureau Order to avoid making inconsistent and prejudicial representations to the courts.[53]

2. Complainant's position

25. Complainant responds that both of Respondent's contentions, first, that under *Gulf Power I* no party may have access to its utility poles prior to judicial review of its claim for compensation and second, that the Commission is obligated to stay the Bureau Order pending judicial review, are incorrect. Complainant argues that *Gulf Power I* specifically rejected the notion that Respondent may charge whatever fee it wishes prior to a judicial determination of just compensation,[54] holding instead that "[t]he Fifth Amendment does not require a judicial determination of just compensation in the first instance on each occasion of a taking of private property."[55] Complainant quotes the *Gulf Power I* decision as follows:

> [W]e see no constitutional problem with a process that employs an administrative body, such as the FCC, to determine just compensation in the first instance. Indeed, use of an administrative body with some technical expertise over the subject matter of the property to be valued likely will aid the judiciary in arriving at a more reliable determination of the proper level of just compensation. So long as an administrative body's decision

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[53] Citing *Chandler v. Samford University*, 35 F. Supp. 2d 861, 863 (N.D. Ala. 1999); *Morrow v. City of Birmingham*, 926 F. Supp. 1033, 1040-42 (S.D. Ala. 1996), *aff'd*, 117 F.3d 508 (11th Cir. 1997) and *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995).

[54] Citing *Gulf Power Co. v. FCC*, 187 F.3d 1324, 1334 (11th cir. 1999).

[55] Citing *Id.* at 1334.

concerning the level of compensation owed for a taking remains subject to judicial review to ensure just compensation, use of an administrative body can be a valid part of 'provid[ing] an adequate process for obtaining compensation.'[56]

26. Complainant continues that if a court reviewing a rate decision by the Commission concludes that the rate does not provide just compensation, it may issue a new rate order which ensures that just compensation is provided from the commencement of any attachment. Complainant also asserts that Respondent's claim concerning the Commission's alleged representation to the *Gulf Power I* court is erroneous. Complainant states that no such promise was made, rather the response to the Court's question merely stated that the Commission has the power to stay its rate order pending review by a court of appeals. Complainant points out that neither the Department of Justice nor the Commission ever promised to always grant such a stay and the Commission did not bind itself to a blanket policy requiring a stay of any rate order simply because the utility disagreed with the result.

27. Complainant also points out that in this case, a stay of the Bureau Order requiring the parties to negotiate an agreement in good faith would effect a drastic change in the status quo and irreparable harm. Complainant argues that committing itself to such an inflexible policy of staying every decision would rob the Commission of any effective legal authority to fulfill its statutory duties under the Pole Attachment Act. Complainant concludes that because the Commission never made the unlikely promise that Respondent claims, to stay its own rate orders pending judicial appeal, the refusal to grant the stay requested by Respondent is neither contrary to express Commission policy nor void due to estoppel.[57]

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[56] Citing *Id.* at 1333.

[57] Complainant also notes that the Respondent's argument that the cable industry also "committed" to the Eleventh Circuit to pay whatever a

3. Discussion

28. The Fifth Amendment to the United States Constitution states in pertinent part that "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."[58] The 1996 Act amendments to the Pole Attachment Act gave cable operators and telecommunications carriers a mandatory right of nondiscriminatory access to utility poles, ducts, conduit and rights-of-way.[59] In *Gulf Power I*, the Court analyzed the constitutionality of this right of access in light of the Fifth Amendment's prohibition against the taking of property for public use without due process and just compensation. After disposing of the issue of whether the mandatory access provision effects a taking of property and finding that it did, the *Gulf Power I* Court reviewed whether an adequate process is available to a utility to secure just compensation for that taking. The Court concluded that there is an adequate process. First, the Court stated that a reasonable, certain and adequate provision for obtaining compensation must exist at the time of the taking.[60] Then the Court determined that, although it is ultimately the responsibility of the judicial branch to ensure that the constitutional standard of just compensation is satisfied,[61] there is

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utility asked pending judicial review is inaccurate, citing an April 5, 1999 letter by counsel for the National Cable Television Association to Thomas Kahn, Clerk of the Eleventh Circuit ("If the FCC orders a reduction in rates, utilities may likewise seek a stay of the rate order from either the FCC or the Court of Appeals") (emphasis added by Complainant).

[58] U.S. Const. Amend. V.

[59] 47 U.S.C. § 224(a),(f).

[60] *Gulf Power I* at 1331.

[61] *Id.* at 1333

no constitutional problem with a process that employs an administrative body, such as the Commission, to determine just compensation in the first instance.[62]

29. The *Gulf Power I* Court next reviewed the existing process for judicial review of Commission orders to determine if that judicial review process ensures that the final and conclusive determination of the just compensation owed to a utility is made by the judicial branch.[63] *Gulf Power I* concluded that because the judicial review process could ensure that a utility would receive a just compensation rate both prospectively and in the period prior to the court's determination of the issue, the process is constitutionally adequate.[64] Although no party to the *Gulf Power I* decision appealed the Court's determination on this issue, various parties, including Respondent, continue to argue that the process is inadequate. Our review of the letters provided in response to the Court's question, stated above in paragraph 23, reveal that neither the Commission, nor the Department of Justice representing the Commission, indicated that the Commission would stay all pole attachment compensation orders pending judicial review. The letters merely provide a summary of the existing process, which allows either the Commission or a court to stay a compensation order pending further review. Indeed, had the *Gulf Power I* Court relied on any such representations in reaching its conclusions, it would have included those representations in its reasoning supporting its decision. Instead, the *Gulf Power I* decision reiterates the process as it exists and as it was referred to in

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[62] *Id.* at 1333.

[63] *Id.* at 1334.

[64] *Id.* at 1335 ("Directing the FCC to issue a rate order providing that a utility receive the just compensation rate from the date it was first required to provide access under the mandatory access provision will ensure a utility receives just compensation both prospectively and in the period prior to the court's determination of the just compensation rate.")

the referenced letters.[65] As the *Gulf Power I* court concluded, the Commission's rules provide an adequate process for a pole owner to secure just compensation under the constitutional standard as elucidated in *Gulf Power I*. We find that denial of Respondent's request for a stay is not inconsistent with the representations made by the Commission and the Department of Justice to the Eleventh Circuit Court of Appeals in *Gulf Power I*. We therefore reject Respondent's argument that the Commission is estopped from reviewing any requests for stay on the merits of the request.

30. Furthermore, Respondent's argument that every compensation order should be automatically stayed without regard to the merits of such action is unpersuasive. Respondent's proposal would allow Respondent to charge any rate with impunity, completely nullifying the Pole Attachment Act, whose purpose is to prevent the charging of monopoly rents by utilities for pole attachments. Respondent could charge monopoly rents, eliminate competition to Respondent's own services, and create not only a monopoly over poles but over services as well.

31. We are also not persuaded by Respondent's arguments for a stay of this Bureau Order. To be successful on a request for stay of the effectiveness of a bureau or Commission order pending judicial review, Respondent must demonstrate that (1) it has a substantial likelihood of succeeding on the merits; (2) it would suffer irreparable harm absent relief; (3) a grant would not substantially harm others; (4) the relief requested would be in the public interest.[66] Other than arguing, as noted

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[65] *Id.* at 1334-1336.

[66] *See Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (DC Cir. 1977); *In the Matter of Applications of Cumulus Licensing Corp.*, Order, FCC 00-391 (released Jan. 17, 2001), *In the Matter of Applications of Shareholders of CBS Corp. and Viacom, Inc. for Transfer of Control of CBS Corp. and Certain Subsidiaries*, Order, FCC 01-94 (released March 16, 2001).

above, that the Commission made representations to the *Gulf Power I* court, Respondent did not attempt to support its emergency petition for stay. By not staying the Bureau Order, we are preserving the status quo and avoiding the disruption to the Complainant's cable operations pending this further review by the Commission and the appeals court. As the *Gulf Power I* Court concluded, "it is just as likely that the earlier rate formula gave the utilities industry more than the constitutional minimum." [67] We conclude that Respondent has not presented evidence that would support a stay of the Bureau Order pending Commission or judicial review.[68]

D. The requirement of just compensation

1. Respondent's position

32. In addition to its process arguments, Respondent argues that the Order fails to provide just compensation because, according to Respondent, the Commission's formula does not provide the "full and perfect equivalent in money of the property taken."[69] Respondent lists three reasons why the formula is constitutionally deficient in Respondent's view. First, Respondent claims that the formula does not require cable companies to pay their fair share of the costs of unusable space; second, Respondent claims that the formula does not allow for a recovery from all of the FERC accounts containing pole-related costs; and third, the formula uses embedded costs in its calculations. Respondent disputes that the formula provides compensation for the fully allocated costs of a pole and argues that the $38.81 fee is a conservative measure of just compensation. Respondent argues that

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[67] *Gulf Power I* at 1338.

[68] We note that Respondent presented a more thorough argument in its petition for stay filed with the 11th Circuit Court of Appeals in Case No. 00-147631. However, Respondent's petition for stay was denied by the 11th circuit Court of Appeals on Jan. 3, 2001.

[69] Citing *United States v. Miller*, 317 U.S. 369, 373 (1942).

judicial precedent indicates that in instances where market value is not readily apparent, there are various other measure of value that are employed to ensure that compensation meets the constitutional standard.[70] Respondent argues that it submitted voluminous materials establishing that the $38.81 charge is consistent with principles of just compensation and that the Commission's formula fails to provide just compensation.

33. In support of its argument that the formula does not require cable companies to pay their fair share of the costs of unusable space, Respondent cites to the legislative history of the 1996 Act amendments to the Pole Attachment Act. Respondent argues that, in establishing a rate for telecommunications attachers as opposed to cable attachers, Congress expressed a view that the unusable space on a pole "is of equal benefit to all entities attaching to the pole."[71] Respondent continues that the formula's use of embedded costs does not provide just compensation. Respondent asserts that using embedded or historical costs is disfavored as a measure of current market value.[72] Respondent continues that the cost of materials, labor, easements, and placement is greater today than it was at the time the system was constructed and the market value of the pole system is far greater than the historical cost of the system. Respondent argues that demand for the utility corridors has increased and the value of the linear corridors in the modern technological era is not related to the original cost of a single pole. Respondent also argues that forward-looking, or replacement, cost is the measure used to determine the prices new entrants into the telecommunications market must pay to incumbents to

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[70] Citing *United States v. Toronto, Hamiliton, & Buffalo Navigation Co.*, 338 U.S. 396, 403 (1949).

[71] Citing House Report No. 104-204, at 92; House Conf. Rep. No. 104-458, at 206.

[72] Citing *Id.* and 8A Nichols § 20.01.

purchase unbundled elements of the incumbent's network and consistency demands that the same pricing methodology be applied throughout the 1996 Act.[73] Respondent admits however, that prospective attaching entities, unlike the entrants seeking access to an incumbent's telecommunications network, are not the pole owners' competitors in providing electric services.

34. Specifically, Respondent submitted an affidavit in which the affiant [74] ("Affiant I") claims to apply standard appraisal techniques and valuations for property similar to pole attachments. Respondent asserts that Affiant I concluded that there is an active and competitive market for communications corridors, clusters, and systems. Affiant I used three approaches to determine market value: a depreciated replacement cost plus enhancement approach, a sales comparison approach, and an income capitalization approach. In addition, Affiant I included a factor for entrepreneurial profit; used an economic-based depreciation rate calculated for Respondent (as opposed to a tax-based depreciation rate); and used a separate depreciation rate for purposes of determining the carrying charge to reflect that portions of capital could be reinvested over time. Affiant I concluded that Complainant should be paying an annual rate of $47 under the first approach; $25-$40 or $628 under the second approach; and $38.69-$64.48 under the third approach, leading to a reasonable range of $40-$55.

35. Respondent also provided another affidavit with its Response to the Complaint which purports to explain why the Commission's formula does not provide just compensation. In that affidavit, the affiant[75] ("Affiant II") incorporates a

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[73] Citing *Iowa Utilities Board v. FCC*, Case No. 96-3321, at 10 (8th Cir. 2000).

[74] Mr. Henry J. Wise, MAI.

[75] R.E. Prater, Manger, Power Dleivery Support for Alabama Power Company.

previous affidavit, filed in response to the Commission's pole attachment rulemaking proceedings.[76] Affiant II's affidavit may be summarized as follows: Affiant II asserts that Respondent's $38.81 rate does not include any enhancement value; the rate uses gross investment in calculating carrying charges; the rate reflects a conservative approach to the number of attaching entities; the rate for a telecommunications attacher is more than three times higher than the cable attacher rate; increasing costs in building and maintaining networks are not reflected in embedded costs; joint use agreements with telephone companies reveal rates between $26.29-$30.30; the formula should include more FERC accounts; the cable rate does not allow recovery for unusable space; the presumptions in the formula don't apply to Respondent; gross investment figures should be used without excluding costs for grounds and arrestors; gross investment figures should be used in the denominator of the carrying charges even though this will lower the rate; forward-looking cost of capital should be used but the calculation is internal and not publicly available; and finally, an enhancement value should be included. Affiant II concludes that the use of replacement costs plus every other factor Respondent requests yields a rate of $43.03.

2. Complainant's position

36. Complainant responds that the Bureau Order correctly determined that the combination of full recovery for make-ready or change-out costs, along with the full recovery of costs associated with the space used for the attachment, as well as a return on capital allowed under the Commission's formula provides just compensation to Respondent. Complainant asserts that the Constitution does not support Respondent's argument that it is entitled to a higher pole attachment rate than that calculated in accordance with the

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[76] CS Docket No. 97-98.

Pole Attachment Act and the Commission's regulations. Complainant argues that just compensation is determined by the loss to the person whose property is taken,[77] generally measured by one of three approaches: market value, the income approach, or the cost approach.[78] Complainant explains that in the case of pole attachments, none of the three approaches, market value, the income approach, or the cost approach applies. Complainant concludes that the Commission's formula, which is based upon payment of the operating expenses and actual capital costs of the utility, is consistent with the constitutional requirement of reimbursing loss to the owner of property. Complainant argues that Respondent failed to demonstrate a factual or legal basis for higher compensation than that provided by the Commission's regulations and the burden of proving loss, as well as the amount of any loss, is upon the party claiming to have experienced a taking.[79]

37. Regarding the market value approach, in the case of pole attachments, Complainant asserts that there is no market for attachments to utility poles. Complainant argues that the Supreme Court stated that "market value" is not an appropriate method for calculating just compensation "'when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.'" [80] Complainant states that attempting to calculate a

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[77] Citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319 (1987), quoting *United States v. Causby*, 328 U.S. 256, 261 (1946).

[78] Citing *United States v. Miller*, 317 U.S. 369, 374 (1942); Nichols on Eminent Domain, § 14A.06[2] and [3].

[79] Citing *United States v. John J. Felin & Co.*, 334 U.S. 624, 641 (1948).

[80] Citing *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984), (citing *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10 n.14 (1984).

"market value" for pole attachment space would result in manifest injustice to the public because poles themselves are monopoly resources, for which no feasible substitutes exist and to monetize that monopoly value and attempt to embrace it as "market value" would preclude any remedy for monopoly abuses. Complainant points out that it has long been recognized by the courts,[81] Congress,[82] and the Commission,[83] that utility poles and like structures are essential facilities, mandatory corridors that communications services must share. Complainant asserts that Affiant I's attempt to calculate a "market value" for Complainant's pole attachments by comparing them to joint use agreements between Respondent and telephone companies and by analogizing to railroads and wireless communications towers is misguided. Complainant argues that joint use agreements are not relevant because telephone companies occupy more space than cable operators and because utilities specifically establish high fixed asset values in order to obtain compensation from state public service commissions. Complainant also questions Affiant I's lack of evidence of actual transactions.

38. Next, Complainant rejects the income approach because a pole attachment does not itself generate income and does not involve a taking of an entire business. Complainant asserts that the income approach is premised upon the idea "that a potential buyer will be willing to pay a price for an

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[81] Citing *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 247 (1987); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132, 1146-47 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *TV Signal Co. of Aberdeen v. American Tel. & Tel.*, 1981 U.S. Dist LEXIS 11080, *14-15 (D.S.D. 1981); and *General Telephone Co. of Southwest v. United States*, 449 F.2d 846, 851 (5th Cir. 1971).

[82] Citing 123 Cong. Rec. 35,006 (1977).

[83] Citing *Twixtel Technologies, Letter from FCC Common Carrier Bureau*, July 6, 1990 at 4; Section 214 Certificates, 21 F.C.C.2d 307, 323-29 (1970).

asset that reflects a present value of the future benefits (i.e., income) that the buyer can realize from the asset."[84] In the case of pole attachments, Complainant argues, Complainant does not obtain ownership of even a section of a pole, let alone an entire business. Per Complainant, Respondent's contract limits an attacher's rights to a mere license and attachments do not deprive Respondent of its business or displace its operations. In addition, Complainant argues, it is impossible to forecast a future income stream that would be tied to an attacher's use of a percentage of otherwise unused, excess pole capacity. Furthermore, Complainant argues that Respondent's claim that the income approach to valuation supports a five-fold increase in pole rents is baseless because Affiant I does not even attempt to follow a real income approach to valuation, which requires consideration of the anticipated future income generated by an asset and translation of that income stream into present value using an appropriate discount rate. Instead, according to Complainant, the appraiser simply postulates a pole replacement cost, an unrealistic three to five year payback period for utility poles, an inflated cable pole occupancy percentage of 27 percent, and then uses simple division to determine a figure for annual pole rental.

39. Finally, regarding the cost approach, Complainant argues that Respondent's use of reproduction costs does not make sense because it is not reasonable to reproduce existing utility poles. Complainant argues that the "cost approach" may be used to determine just compensation for pole attachments only if it is based upon actual costs because replacement cost valuation for pole attachments is inconsistent with the law on just compensation. Complainant asserts that a replacement cost approach requires that the property interest being condemned be complete ownership.[85] Complainant's

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[84] Citing *Nichols*, § 14A.06[3].

[85] Citing *Nichols*, § 14A.06[2][e].

pole attachments, Complainant argues, occupy only a fraction of Respondent's poles. In addition, Complainant asserts, courts do not apply a replacement cost approach to valuation if reproducing the property would not be a reasonable business venture.[86] Complainant continues that utility poles cannot be reasonably reproduced because they are an essential facility.[87] Complainant states that Affiant I's "share the savings" approach, in which the rental is compared to what cable operators would have to spend to reproduce something that zoning, environmental, and other restrictions prevent them from reproducing—a duplicate network of utility poles, does not have any basis in appraisal methodology. Complainant points out that Respondent never incurs any replacement costs when cable operators attach to Respondent's poles because, when additional space is needed, Respondent recovers its costs, dollar for dollar, in the form of make-ready charges.

40. Complainant argues that, in the context of negotiated contracts, the Supreme Court upheld the constitutional sufficiency of the compensation provided by the formula,[88] and that Respondent has not met its burden to show that the reasoning in Florida Power does not apply to mandatory access. Complainant disputes that Consolidated Gas,[89] cited by Respondent, has any precedential weight, because it was a dissent, not a holding of the court, and the entire case was vacated by the Supreme Court and dismissed with prejudice. Even so, Complainant argues that even under the reasoning of

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[86] Citing *United States v. Toronto, Hamilton & Buffalo Navigation*, 338 U.S. 396, 403 (1949).

[87] Citing *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987).

[88] Citing *FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987).

[89] Citing *Consolidated Gas Co. of Florida v. City Gas Co. of Florida*, 912 F.2d 1262, 1314-1316 (11th Cir. 1990), vacated, *City Gas Co. of Florida v. Consolidated Gas Co. of Florida*, 111 S.Ct. 1300 (1991).

Consolidated Gas, which required a reasonable rate of return on investment, the Commission's provision in the cable rate formula for fully allocated costs (including a return on capital) would provide Respondent with compensation that is constitutionally sufficient.

41. Finally, Complainant responds to Respondent's various specific issues regarding the pole rate formula's elements pertaining to usable space and pole height presumptions; the use ratio; particular utility cost accounts; and the use of historical costs. First, Complainant points out that Respondent has not met its burden of presenting the Commission with new evidence on any of these issues that would justify a rate greater than the current rate. With respect to usable space and pole height presumptions, Complainant argues that Respondent presents the same arguments and evidence that the Commission rejected in rulemaking proceedings.[90] Although the usable space figures used by the Commission are rebutable presumptions, Complainant argues that Respondent does not introduce sufficient evidence of differing pole height or minimum attachment heights for the specific plant at issue. Complainant also points out that Respondent's claim that its average existing pole height should be considered to be forty feet is based on average replacement pole height for the most recent year. Complainant also points out that, even if the Commission accepted Respondent's claim that its average pole height is forty feet, the resulting pole rate with all adjustments would be less than the current rate.

42. Complainant continues that Respondent's contention, that the Commission must apply the full cost allocator specified for telecommunications services, that is scheduled to be phased in over five years, to cable systems would have the undesirable consequence of greatly impeding the

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[90] Citing Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 (2000) ("Fee Order").

development of the facilities-based competition intended by the 1996 Telecommunication Act. Complainant states that the cable rate space allocator of 7.4% requires cable attachers to pay the utilities' operating costs in the same proportion that the cable attachment bears to the total usable space on a utility pole. Complainant continues that the difference between rates calculated under the cable formula and the fully-phased in telecommunications formula may be insignificant, depending upon the number of competitive local exchange carriers ("CLECs") that attach to poles in the coming years.[91] Complainant argues that the gradualness of the increase in rates attracts and retains facilities-based competitors until a later stage in the development of a competitive market when there are a sufficient number of parties on the pole that a "per capita" allocation of pole costs does not create an undue burden on any of the attaching parties. By contrast, Complainant argues, if that full rate is implemented today, then the pole rate will artificially increase, creating a potentially insurmountable barrier to the deployment of new facilities and an incentive for a cable operator not to diversity into telecommunications.

43. Complainant disagrees with Respondent's contention that certain additional expense accounts should be included in the derivation of the pole rent. Complainant asserts that much of the argument and advocacy presented by the Respondent are lifted in their entirety from presentations made in a previous Commission pole attachment rulemaking proceeding,[92] the rulemaking, where it was considered and rejected. Complainant argues that Respondent fails to advance sufficient evidence to prove that any residual expenses related to poles that may be included in these accounts is significant or

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[91] Citing Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd. 6777 (1998).

[92] CS Docket 97-98.

that they would not would create a double charge against make-ready expenses.[93] Specifically, Complainant argues that clearing costs are already capitalized into FERC Account 364, which is included in the formula, and cable operators pay right-of-way and other related fees directly to the appropriate local government authority. Complainant argues that any allocation of land and land rights to poles (as opposed to aerial space) based on the data Respondent provided would only add four cents to the pole rate, which would still be less than the current rate. In addition, Complainant points out that grounding involves installing a conductor and ground rod to discharge power surges or to discharge induced current. Complainant states that cable operators are required to attach their facilities to the electric company ground, but existing power company grounding systems are not sufficient to ground these system components and each attaching party is responsible for grounding its own system of conductors.[94] Excluding grounding systems, Complainant argues, is also consistent with FERC accounting and recent public service commission authority.[95]

44. Complainant argues that the practice of having cable operators pay make-ready and change-out costs assures that any actual replacement costs associated with pole attachments are borne by the attaching party, and in accordance with this practice, Respondent receives over one million dollars per year from cable operators through make-ready reimbursements. In addition, Complainant argues, Respondent's proposed calculation of carrying charges times replacement cost results in a recovery of nearly three times the administrative

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[93] Citing Fee Order at ¶ 61 and Declaration of Patricia D. Kravtin, CS Docket No. 97-98, ¶¶ 45-48.

[94] Citing Complainant's Reply at 46-50 and Declaration of John Pietri, at ¶¶ 8-10, CS Docket No. 97-98.

[95] Citing 18 C.F.R. Part 101 (Account 365) and *Consumers Power Co., et al.*, Case No. U-10831 at 23.

overhead and taxes that Respondent actually incurs, and fails to account for accumulated deferred taxes. Complainant argues that Respondent's inclusion of an unsupported "entrepreneurial incentive" is inconsistent with its existing regu latory obligation to erect and maintain poles. Complainant points out that the Commission's approach has been corroborated by state public service commissions in California,[96] Michigan,[97] New York,[98] and elsewhere,[99] that have affirmatively rejected using reproduction costing for pole attachments, and by the utilities' own use of embedded costs to establish the financial arrangements with telephone utilities under joint use agreements. Complainant concludes that the use of historic costs in determining pole attachment rates also meets appraisal standards for currency and reliability.

3. Discussion

45. We begin our review of the issue raised by Respondent, whether the Commission's pole attachment rate formula provides just compensation under the Fifth Amendment to the United States constitution, by picking up the analysis at the point where the Supreme Court last addressed it some years ago. In *Florida Power*, the Supreme Court was faced with

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[96] Citing Cal. Pub. Util. Code § 767.5 (Deering 1996).

[97] Citing *Consumers Power Co. et al., Mich. Pub. Serv. Comm'n.*, Case Nos. U-10741, U-10816, U-10831 at 20 (Feb. 11, 1997), *aff'd, Detroit Edison Co. v. Michigan Public Service Commission*, Slip. Op., No. 203421 (Mich. App. Nov. 24, 1998), *appeal denied, Detroit Edison Co. v. Michigan Public Service Commission*, 602 N.W.2d 386 (Mich. 1999).

[98] Citing In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues, N.Y. Pub. Serv. Comm'n. Case No. 95C-0341 at 11 (June 17, 1997).

[99] Citing Review of Cost Studies, Methodologies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services, Georgia Pub. Serv. Comm'n, Docket 7061-U (October 21, 1997).

this very issue, the constitutional sufficiency of the pole attachment rate formula. The *Florida Power* court first addressed whether the Pole Attachment Act in effect at that time, which did not include a mandatory access provision, authorized a per se taking of property as that term was defined in *Loretto v. Teleprompter* ("*Loretto*").[100] In *Loretto*, the court determined that a New York statute that required a rental property owner to permit cable attachments to its rental property effected a taking for which just compensation is due. The *Loretto* Court concluded that in cases where a regulation restricting the use of property amounts to a physical occupation, there is a taking to the extent of the occupation, without regard to other factors that a court might ordinarily examine such as "the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action."[101] The *Loretto* Court did not express an opinion on the amount of compensation due.[102] In *Florida Power*, the court concluded that the Pole Attachment Act did not authorize a taking under the *Loretto* physical invasion test. The Court stated, in reference to the application of a per se taking rule, that it did not decide what the application of *Loretto* would be "if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements."[103]

46. The *Florida Power* court dealt with the *Loretto* issue because it was reviewing the lower court's conclusion that the Pole Attachment Act effected a per se taking of property, and the lower court's conclusion that, because the Pole Attachment Act authorized the Commission to make the initial

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[100] 458 U.S. 419 (1982).

[101] *Loretto* at 432.

[102] *Id.* at 441.

[103] *Florida Power* at 252, n.6.

determination of compensation, a judicial function, it was unconstitutional. The Supreme Court reversed the lower court on both issues. The most important aspect of *Florida Power*, for purposes of our review of the issue now before us, is the court's treatment of the remaining question, whether, under traditional Fifth Amendment analysis, the Commission's pole attachment rate formula effected a taking of property without just compensation. The Court concluded that it did not. The Court stated that it could not "seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory."[104] The *Florida Power* court squarely determined that the compensation provided by applying the Commission's pole attachment formula is constitutionally sufficient.

47. In reaching this conclusion, the Court stated that "[I]t is of course settled beyond dispute that regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible" [105] . . . "so long as the rates set are not confiscatory." [106] In *FPC v. Hope Natural Gas Co.* ("*Hope Natural Gas*"),[107] in the context of rate regulation, the Supreme Court concluded that "[u]nder that statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling." [108] The *Hope Natural Gas* Court continued that "[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid . . ." [109] In *Duquesne Light Co. v. Barasch*,

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[104] *Id.* at 254.

[105] *Id.* at 253.

[106] *Id.*

[107] 320 U.S. 591 (1944).

[108] *Id.* at 602.

[109] *Id.* at 605.

("*Duquesne Light*")[110] the Supreme Court summarized the history of the development of the standard for reviewing rate regulation, beginning with Justice Brandeis' dissent in *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*,[111] and noting that "[p]erhaps the most serious problem associated with the fair value rule was the 'laborious and baffling task of finding the present value of the utility'",[112] and that the "test usually degenerated to proofs about how much it would cost to reconstruct the asset in question, a hopelessly hypothetical, complex and inexact process."[113] The *Duquesne Light* court stated that "[f]orty-five years ago in the landmark case of [*Hope Natural Gas*], this Court . . . held that the 'fair value rule' is not the only constitutionally acceptable method of fixing utility rates. In [*Hope Natural Gas*] we ruled that historical cost was a valid basis on which to calculate utility compensation."[114]

48. In *Florida Power*, the Supreme Court appropriately applied this standard of review to the Commission's pole attachment rate formula and found that the formula did not effect a taking of property without just compensation. The Commission's pole attachment formula ensures that a utility receives full compensation for any loss incurred as a result of an attachment. The attacher directly compensates the utility through make-ready and change-out charges for the cost of any modifications to utility poles necessitated by the attachments, including pole rearrangements, inspections, pole replacements, and other direct incremental costs of making

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[110] 488 U.S. 299 (1989).

[111] *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923).

[112] *Duquesne Light* at 309, n.5 (citation omitted).

[113] *Id.* (citation omitted).

[114] *Id.* at 310.

space available to the cable operator. In addition to these charges, the attacher pays a proportionate share of pole capital costs and operating expenses based on the amount of space occupied by the attachments. The Commission's pole attachment rate formula for cable attachers allocates the cost of the entire pole by the percentage of total usable space used. The formula includes recovery for all pole-related costs, including administrative, maintenance, and tax expenses, as well as depreciation and a rate of return approved by the utility's state public service commission. The Supreme Court determined that this formula results in a rate that is not confiscatory.[115] Under the *Florida Power* standard of review for regulated rates, the current pole attachment formula for cable attachments, which is substantially unchanged from that reviewed by the *Florida Power* court, provides just compensation.

49. On February 8, 2001, pursuant to the Pole Attachment Act, a second rate became effective for telecommunications attachers. The telecommunications pole attachment rate is similar to the cable attachment rate with the sole exception being a different methodology for determining the proportion of pole space that is attributable to the attachment. Pursuant to statutory mandate, the telecommunications pole attachment rate allocates the cost of the unusable portion of the pole to an attacher based on the total number of attaching entities rather than on the portion of usable space occupied by the attachment. Congress' decision to choose a slightly different rate methodology, more suited in its opinion to telecommunications service providers, does not call into question the constitutionality of the cable rate formula. The existence of a difference between the formulas does not arise to a constitutional issue, because both formulas provide just compensation under the Fifth Amendment. In *Duquesne Light*, the

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[115] *Florida Power* at 254.

Court reiterated that "'rate-making power is a legislative power and necessarily implies a range of legislative discretion.'" [116] Congress used its legislative discretion in determining that cable and telecommunications attachers should pay different rates. The end result of the application of the telecommunications pole attachment formula is a rate which reflects the fully allocatedcosts of the pole-related expenses and is therefore, not confiscatory under the *Florida Power* test. Because the end result is not confiscatory, it satisfies the Fifth Amendment requirement that property not be taken without just compensation. As the *Duquesne Light* court stated, "the commission[117] 'must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests.'" [118] Under the *Florida Power* test, both the cable and telecommunications pole attachment rate formulas provide the utilities with rates that are constitutionally sufficient.

50. Although *Florida Power* is settled law, the question of the constitutional sufficiency of the Commission's pole attachment rates has been raised by Respondent. Confusion about the issue has arisen following the Eleventh Circuit Court of Appeals' decision in *Gulf Power I*, which held that, under the reasoning of *Loretto*, the 1996 Act's mandatory access amendments to the Pole Attachment Act effect a taking of property. Based on its finding in *Gulf Power I*, in *Gulf Power II*, the Eleventh Circuit found that the Commission's regulations implementing the 1996 Act amendments to the Pole Attachment Act also authorize a taking of

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[116] *Duquesne Light* at 313 (quoting *Minnesota Rate Cases*, 230 U.S. 352, 433).

[117] State of Pennsylvania Public Utilities Commission (footnote not in original).

[118] *Id.* at 313-314 (emphasis in original) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 767).

property. Both opinions reserved on the issue of whether the statute or the regulations provide just compensation under the Fifth Amendment to the Constitution, stating that the issue was not ripe for review.[119] In *Gulf Power I*, utilities made essentially the same argument that Respondent makes, that " because a utility's property is now being taken, the rate it was able to collect when it was voluntarily providing access is no longer appropriate. This is so, they argue, because the standard for determining just compensation for a taking should be more rigorous than that for determining a rate for providing voluntary access." [120]

51. Respondent's argument misinterprets the extent of the holding in *Gulf Power I* and *II*. The courts' finding, that the mandatory access provisions of the Pole Attachment Act and the Commission's regulations authorize a taking, merely changes the initial focus of the review of pole attachment rates set using the Commission's formula. Instead of first examining the "character of the governmental action" [121] the review proceeds directly to the measure of compensation. However, that measure of compensation is not changed simply because the regulation restricting the use of property amounts to a physical occupation under *Loretto*. Changing the nature of access from voluntary to mandatory did not change the extent of the property occupied. The essential nature of the regulation, a restriction on the price that a utility may charge for attachments to its monopoly-owned poles, remains unchanged. The constitutional measure of value of that property is the same as the measure that has been used since *Hope Natural Gas*, if the end results of the regulations are "[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and

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[119] *Gulf Power I* at 1338; *Gulf Power II* at 1272-73.

[120] *Gulf Power I* at 1337.

[121] *Loretto* at 432.

to compensate its investors for the risks assumed . . .",[122] then the regulations are constitutionally valid. The Commission's formula uses the same public information that is gathered in other federal and state rate-making processes, processes that are constitutionally sufficient under the *Hope Natural Gas, Duquesne Light* and *Florida Power* standard of review, to calculate the pole attachment rate.

52. The Commission's formula enables a utility to recover all of the costs that are attributable to the pole attachment. The property at issue, excess, unused pole attachment space, is the same whether the attachment is obtained through voluntarily signed contracts or through mandatory access. The Respondent has voluntarily entered into a regulated industry and voluntarily used its poles for wire communications. Respondent's belief that it is entitled to obtain a higher return on pole attachments that are not voluntarily negotiated has no constitutional basis; the utility pole space is the same property used by Respondent in its regulated core business and is only a small portion of otherwise unused property. The Commission's formula, by providing Respondent with reimbursement of its operating expenses and its cost of capital proportionate to the space used by an attachment, enables Respondent to continue to operate successfully, maintain its financial integrity, attract capital, and compensate its investors at a rate approved for property devoted to the operation of a regulated industry. The Commission's formula relies on the latest year-end actual publicly reported costs of utilities and assures just and reasonable rates to both the utility and the attaching parties, establishes accountability for prior cost recoveries, and accords with generally accepted accounting principles. We affirm the Bureau's determination that the Commission's formula provides just compensation to a utility for the use of its poles for attachments by cable system operators.

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[122] *Hope Natural Gas* at 605.

53. In essence, Respondent argues that we should apply a different analysis to determine just compensation. Even if we were to assume, for the sake of argument, that Respondent's argument has merit, we would still end up with the same measure of compensation. The objections to other measures of just compensation for rate regulations, objections which lead to the development of the standard applied in *Florida Power*, and which are summarized in *Duquesne Light*, are just as valid in this case as in any preceding rate case. In *United States v. Commodities Trading Corp.*,[123] the Supreme Court stated that it "has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases." [124] Just compensation is generally determined by the loss to the person whose property is taken,[125] keeping in mind that "[t]he word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity.'" [126] The determination of just compensation centers on putting the property owner in as "good position pecuniarily as he would have occupied if his property had not been taken." [127] One common measure of loss is the fair market value of the property taken. Fair market value represents a price that reflects what a purchaser in fair market conditions would pay for the property.[128] However, the Supreme Court has concluded that where a property has no market, when market value is too difficult to find, or when the application of a market value standard would result in manifest injustice, other standards and other data must be applied.[129] Because of

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[123] 339 U.S. 121 (1950).

[124] *Id.* at 123.

[125] *United States v. Causby*, 328 U.S. 256, 261 (1946).

[126] *United States v. Commodities Trading Corp.*, 339 U.S. at 124.

[127] *United States v. Miller*, 317 U.S. at 373.

[128] *United States v. Miller*, 317 U.S. 369, 374 (1942).

[129] *Id.* at 374; *United States v. Commodities Trading Corp.*, 339 U.S. at 123.

the unusual nature of pole attachments, and the nature of the property interest conveyed, the three standard appraisal techniques for determining market value, comparable sales, income capitalization, and replacement costs less depreciation, are particularly unsuited for valuing pole attachments.

54. We find Complainant's argument and supporting evidence on this issue to be persuasive. We agree with Complainant that the nature of cable television pole attachment rights and interests, and the monopoly inherent in the poles owned by Respondent and other utilities, affect the measure of compensation. Cable attachers generally have no practical or cost-effective alternative to attachments to existing poles. In any specific area, there is only one provider of pole space and there is usually surplus space on those poles. In this case, and in many other cases, the cable attacher is already on the pole and conducting business and there is no viable alternative. The rates, terms and conditions of pole attachments are regulated because of the bottleneck monopoly status of the utilities' poles. Although utilities continue to argue that poles are no longer bottleneck facilities, no credible evidence of this has ever been presented to the Commission and it certainly cannot be argued that cable operators who already have attachments to utility poles have any other reasonable options to pursue.

55. Despite Respondent's and other utilities' arguments to the contrary, there is no non-monopoly market in pole attachments. There are no arm's length transactions reflecting the prices paid by willing buyers and sellers for comparable pole attachments. Respondent has a monopoly on pole attachments in its service area and any rents it negotiates with other service providers not covered by the Commission's pole attachment rate formula reflect a monopoly value. Respondent's comparisons to other industries, technologies and property rights are inapposite because the property interests involved are too different to draw any meaningful

conclusions. Respondent was unable to show that there is any reasonable way to evaluate a pole attachment value using a comparable sales approach.

56. Under the income capitalization method, the value of a particular piece of property is shown by calculating the present value of the income the property could be expected to generate over its useful economic life.[130] "[F]or a court to allow value to be proved in such a suspect manner, impeccably objective and convincing evidence is required."[131] This approach is impossible or inappropriate in cases in which the property involved either produced no income, or the income was far too speculative to rely on.[132] Complainant reasonably argues that the income approach to valuation is inappropriate because the income generated by a cable television system is the product of many tangible and intangible assets and cannot be attributable to its pole attachment. Respondent listed several different types of valuations under the heading of the income capitalization approach, but none of these valuations even approximate an income capitalization methodology. Respondent failed to meet its burden to show that this methodology is required or even appropriate for pole attachments.

57. Respondent's final attempt at appraisal, using replacement costs less depreciation with or without the addition of an enhanced value, also fails. As Complainant points out, the ownership interest in the space occupied by a pole attachment is a limited property interest, restricted in duration, primacy, exclusivity, and physical manner of use, all of which affect

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[130] *Snowbank Enterprises, Inc. v. United States*, 6 Cl.Ct. 476, 486 (1984).

[131] *United States v. 69.1 Acres of Land*, 942 F.2d 290, 294 (4th Cir. 1991).

[132] *Seravalli, et al. v. United States*, 845 F.2d 1571, 1574-1575 (Fed. Cir. 1988).

the determination of value of the interest conveyed. A pole attachment does not displace the utility from its own use of the pole or from the right to license additional users on the pole. Because the utility's interest in the property is not completely destroyed, requiring the use of replacement costs as a measure of just compensation is inappropriate. Also, it is not feasible to reproduce existing utility poles. Zoning, environmental, local government, and financial constraints make it impractical and often impossible to construct new pole systems. Respondent was unable to offer a reasonable proposal for implementing this methodology, opting instead for a permutation of the Commission's formula, manipulating the various elements to result in a higher rate. Although Respondent argues that the replacement cost appraisal methodology will result in higher pole attachment rates, this theory is not supported by Respondent's calculations. Many of the changes in methodology that Respondent incorporates in its calculations, such as the amount of space occupied, the average number of attaching entities, pole height presumptions, inclusion of lightning arresters and grounding equipment, entrepreneurial incentives, and other increased expenses are not related to a replacement cost methodology. We also find that Respondent, and pole owners in general, are not entitled to an enhanced value or network value for pole attachments. Complainant reasonably argues that the utility is not conveying to the attacher the right to be in the public right-of-way, which is granted by the local franchising authority for a fee, nor does the utility provide the attacher with a complete corridor of access to a network of customers. We find Complainant's arguments persuasive on this issue.

58. The Commission's formula has been used successfully over the years by the Commission and various states [133] to

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[133] As Complainant points out, the majority of states that have certified to regulate pole attachment rates rely on an historic cost methodology. Complainant cites Cal. Pub. Util. Code § 767.5 (1999); Order Instituting

promote reasonable, affordable, predictable, and nondiscriminatory access to poles for cable television systems. Preventing utilities from setting rates for pole attachments at levels that are well in excess of their actual costs and well above the costs that they attribute to themselves in pricing services that compete directly with those offered by attachers, precludes utilities from establishing an unfair and unjustified competitive advantage and improperly discriminating against their competitive rivals. Respondent has not supported its assumption that the constitutional requirement of just compensation entitles Respondent to a higher pole attachment rate than that calculated in accordance with the Pole Attachment Act and the Commission's rules. Respondent has not provided any credible evidence that shows that the Respondent is not compensated fully under the formula and placed in the same position monetarily as it would be but for the attachments. The Commission's cable rate formula, together with the payment of make-ready expenses, provides compensation that exceeds just compensation. In instances where attachers pay the costs of a replacement pole, the attacher actually increases the utility's asset value and defers some of the costs of the physical plant the utility would otherwise be required to construct as part of its core service. Respondent carries the burden to show that the Commission's formula does not provide just compensation.[134] We find that Respondent has

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Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, Decision No. 98-10-058 (Cal. PUC Oct. 22, 1998); *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, New York Pub. Serv. Comm'n Case No. 95-C-0341, 1997 N.Y. PUC LEXIS 364 (Issued and effective June 17, 1997), *recon. denied*, 1997 N.Y. PUC LEXIS 639 (October 7, 1997); *Review of Cost Studies, Methodologies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services*, Georgia Pub. Serv. Comm'n Docket 7061-U, October 21, 1997.

[134] *See Hope Natural Gas* at 602 ("It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate

not met its burden to show that one of its three appraisal methodologies must be used to measure the value of just compensation. We also find that Respondent did not provide sufficient and credible evidence to support its claim to the $38.81 rate. We therefore affirm the Bureau Order's rejection of Respondent's proposed justification of its $38.81 rate.

59. Respondent also challenged specific aspects of the formula, including the formula presumptions for pole height and usable and unusable space. We agree with Complainant that Respondent has not met its burden of presenting the Commission with new evidence that would justify the adoption of different presumptions by the Commission. We have already rejected utility arguments supporting a change in the pole height presumption because the evidence presented was not sufficient to change the presumption of an industry wide average pole height of 37.5 feet.[135] However, in any individual complaint proceeding, the pole height presumption may be overcome with credible evidence that the utility's poles have a different average height. In this case, Respondent could have offered evidence of the specific height data for its cable-attached poles, but instead, Respondent claimed that its average existing pole height should be considered to be forty feet based upon its claim that its average replaced pole in 1999 is approximately forty feet. There is no evidence to support a conclusion that average height of the poles replaced in 1999 reflect the system-wide pole height average. Respondent's proffer is not sufficient or even appropriate data to overcome the presumption of 37.5 feet.

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order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." (citations omitted)); *see also Permian Basin Area Rate Cases* at 767.

[135] *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 (2000).

60. Regarding usable space presumptions, Respondent has not provided data that would overcome the formula presumption of 13.5 feet of usable space on a 37.5 foot pole or the presumption that an attacher uses one foot for its attachment. Respondent also claims that the cable rate formula does not require cable attachers to pay their fair share of unusable space and that cable operators must pay the telecommunications rate in order to provide just compensation to the utility. Respondent's repeated claims that cable attachers do not pay for any costs of unusable space is a complete mischaracterization of the Pole Attachment Act and the Commission's rules. Cable attachers pay all of the costs associated with the pole attachment, which are allocated based on the portion of usable space occupied by the attachment. The costs associated with the entire pole are included in that calculation.

61. Respondent also argues that the absence of particular FERC utility cost accounts in the Commission's formula renders it constitutionally deficient. Respondent admits that it has raised these arguments before, and advances no new evidence to indicate that the expense accounts it identifies must be appropriately included in the formula. We have thoroughly reviewed all of the information provided on this topic by Respondent and Complainant as well as the description of the FERC accounts contained in 18 C.F.R. Part 101 and find no evidence that these accounts contain any significant costs that should be allocated to a pole attachment. Each account contains costs that relate to the utility's core business function of energy distribution and it would not be reasonable or just to include these accounts in a calculation of a pole attachment rate. Respondent argues that administrative efficiency is not a good enough reason for excluding certain accounts. However, administrative efficiency alone is not the basis for the decision to exclude certain accounts. It was based first on the description of the accounts. The insignificance of the relationship of these accounts to pole

attachment costs are what dictate that a full scale ratemaking proceeding to identify every item in the regulatory accounts would be inequitable. As the Supreme Court stated in *Duquesne Light*, "[i]nconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other aspect." [136] In addition, adding accounts containing engineering expenses that are paid for through make-ready expenses would result in a double charge to attachers.

E. Arbitrary and capricious agency action

62. Finally, Respondent argues that the Order constitutes arbitrary and capricious agency action because the Bureau failed to analyze the issue of just compensation and did not address Respondent's evidence concerning rebuttable presumptions in the pole attachment regulations. Complainant disputes Respondent's allegations. Respondent mischaracterizes the Bureau Order. We disagree with Respondent that the Bureau Order was based on arbitrary or capricious decisionmaking. The Complaint was filed in response to the unilaterally imposed $38.81 pole attachment rate, not the negotiated rate of $7.47. The Bureau's first task was to determine if the $38.81 rate was just and reasonable in accordance with the Commission's rules. Because Respondent made no attempt to justify the $38.81 rate using the Commission's rules, and based on the record before us, the rate in fact violated our rules, the Bureau did not err when it found the rate to be unreasonable. Second, the rebuttable presumptions are only pertinent to a rate calculated using the Commission's formula. As discussed above in paragraphs 59-61, Respondent did not offer evidence that would overcome the presumptions used in the formula in this particular application of the formula. The Bureau Order merely noted that the various rates calculated by Complainant using Respondent's financial

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[136] *Duquesne Light* at 314.

information did not result in a rate higher than $7.47, even assuming that Respondent was successful on certain issues. The Bureau was not under an obligation to specifically address those issues which could not affect the final outcome by increasing the $7.47 rate agreed to by the parties. The Bureau is also not required to resolve hypothetical questions. In resolving a pole attachment complaint, the Bureau is not required to revisit the same issues that have already been raised and rejected by the Commission in a rulemaking proceeding. We find that the Bureau properly considered all pertinent evidence. Thus the Bureau Order was not the result of arbitrary and capricious action.

63. Respondent also claims that the Bureau Order is arbitrary and capricious because the Bureau Order improperly relied on administrative convenience as the basis for its decision. We find Respondent's allegations to be completely without merit. Although the Bureau Order considered the congressional and Commission policy to avoid a prolonged and complex rate setting methodology for pole attachments in its deliberations, as indicated above, the Bureau's decision was based on a number of substantive factors. Respondent further argues that the Bureau Order is internally inconsistent because it first acknowledges, in accordance with Commission regulations, that further negotiations between the two parties are likely to be fruitless, in the absence of Commission resolution of the issues raised in the Complaint, and then later orders the parties to negotiate in good faith in accordance with the guidance provided in the Order. Respondent believes this cannot be classified as reasoned decision making. We find Respondent's charges to be without reason or foundation. Every complaint proceeds on the finding that the parties' negotiations have failed over unresolved issues. Resolving the issues for the parties and ordering further negotiations is a just and reasonable decision. We conclude that the Bureau Order is neither arbitrary nor capricious.

64. Respondent also argues that the Commission's continued use of historical costs in the pole attachment rate formulas constitutes arbitrary and capricious action in violation of 5 U.S.C. § 706(2)(A). Respondent observes that the Commission applies a different methodology in the context of universal service requirements and interconnection agreements as opposed to pole attachments. Respondent argues that consistency demands that the same pricing methodology be applied throughout the 1996 Act. We disagree with Respondent's argument that the Commission's continued use of a historical cost methodology in the pole attachment context is arbitrary and capricious. As explained in detail below, the Commission had a rational basis, amply supported by record evidence, for choosing different pricing methodologies in these different contexts.[137]

65. In the Universal Service Order[138] and Local Competition Order,[139] the Commission reasonably and in detail explained that, in connection with universal service requirements and interconnection agreements, ratemaking on the basis of forward-looking economic cost would best effectuate the new competitive objectives of the 1996 Act. These objectives were to stimulate direct competition in local telecommunications markets, to ensure the efficient use of existing telecommunications network facilities, and to encourage new entrants to make economically rational decisions about

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[137] *See Federal Communications Commission, et al. v. National Citizens Committee for Broadcasting, et al.*, 436 U.S. 775, 803 (1978). *See also, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) (the standard of review of an agency action for arbitrariness or capriciousness is a deferential standard by which a reviewing court will uphold an agency action if its has a rational basis).

[138] Federal-State Joint Board on Universal Service, FCC 96J-3, 12 FCC Rcd 87 (1997).

[139] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 96-325, 11 FCC Rcd 15499 (1996).

whether or how to enter a local telecommunications market.[140] The Commission found the use of a forward-looking cost methodology particularly important in this context because we determined that a firm compares forward-looking costs with existing market prices, in making decisions about entry, expansion, and price.[141]

66. By contrast, the predominant legislative goal for Congress in enacting the Pole Attachment Act was "to establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public."[142] Due to the local monopoly in ownership or control of poles, the legislative record indicated that some utilities had abused their superior bargaining position by demanding exorbitant rental fees and other unfair terms in return for access by cable companies to their pole space.[143] This actual and potential anti- competitive behavior prompted Congress to pass the Pole Attachment Act. It was in this context that the Commission, guided by Congressional direction to use existing accounting measures to determine costs, decided to employ a historical cost based pole attachment formula in implementing the Pole Attachment Act.[144] There is nothing

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[140] Local Competition Order, 11 FCC Rcd at 15813, 15817, 15846 (¶¶ 620, 630, 679).

[141] Local Competition Order, 11 FCC Rcd at 15813, 15846 (¶¶ 620, 679).

[142] S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 109.

[143] *Id.*

[144] *See* In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order, 68 FCC 2d 1585 (1978); In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59 (1979).

novel about the Commission's use of a historical cost methodology in the context of regulating monopoly rates. For example, to carry out the statutory goal of section 623(b) of the Communications Act—i.e., to ensure that individual retail subscribers of monopoly cable providers were not exploited—the Commission, in addition to using a benchmark approach, also adopted a historical, cost-of-service alternative methodology for the cable television industry.[145]

67. The Commission's continued use of a historical cost methodology in the pole attachment context is consistent with Congressional expectations. Specifically, while the Commission's pole attachment formula has been in place since 1978, Congress did not directly or by implication instruct the Commission to deviate from the use of historical costs when it amended the Pole Attachment Act in 1996.[146] By comparison, the local competition provisions of the Telecommunications Act of 1996 contemplated some degree of departure by the Commission from its past practice of setting rates on the basis of rate based/rate-of-return regulation.[147] Specifically, section 252(d)(1)(A)(i) requires that rates be based on the "cost" of providing the interconnection or network element "determined without reference to a rate-of-return or rate-based proceeding."[148]

68. In addition, the benefits of using a forward-looking cost methodology are less pronounced in the pole attachment context than in the universal service/interconnection context.

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[145] 47 U.S.C. § 543(b); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulations, 9 FCC Rcd 4527 (1994). *See also Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 178-87 (D.C.Cir. 1995), *cert. denied*, 116 S.Ct. 911 (1996).

[146] *See* S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess. (1996).

[147] *See* Local Competition Order, 11 FCC Rcd at 15857 (¶ 704).

[148] 47 U.S.C. § 252(d)(1)(A)(i).

The Pole Attachment Act protects cable and telecommunications attachers from monopoly prices set by utilities that are not necessarily in direct competition with the attachers, although there may be potential for direct competition.[149] The Pole Attachment Act does not set out a scheme for attachers to access the network elements of a utility's core business. The majority of poles nationwide are owned or controlled by electric utilities, with the remaining poles owned or controlled by telephone companies.[150] Thus, while in some cases pole owner and attacher may both provide telecommunications services, most typically a cable attacher, as is true in this case, or telecommunications attacher is seeking relief under the Pole Attachment Act from the rates, terms and conditions imposed by an electric utility pole owner. In the telecommunications interconnection context, on the other hand, the statute sets out a scheme for determining rates solely between competing telecommunications carriers. Thus, rate regulation in the context of pole attachments is not focused primarily on the same concerns that predominate with interconnection.

69. In addition, the assets being regulated in the two contexts are very different. The Pole Attachment Act addresses access to poles, ducts, conduits and rights-of-way, in contrast to the unbundled elements of an incumbent's telecommunications network that are addressed in the interconnection context. These telecommunications network elements, in contrast to poles, ducts and conduits, are subject to a rapidly changing technology. A forward looking cost pricing methodology reflects the cost of replacing the functions of an asset

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[149] We recognize that increasing convergence of services and electric utilities' entry into telecommunications may change this situation in the future.

[150] *See* 1977 Senate Report. In the 1977 Senate Report, Congress also noted that poles owned by cable companies were less than 0.1 percent of the total number of poles nationwide. There is nothing in the record to suggest that this percentage has markedly changed.

using the most efficient technology available so as to appropriately capture the technological changes that are occurring.[151] As a result, new entrants are given the proper cost signals to decide whether to construct their own networks or to use the incumbent's. In the context of pole attachments, there has been significantly less change in the nature of the asset since their deployment decades ago, so it is not as critical to employ a formula that accounts for such factors. Indeed, given the nature of the pole attachment asset, the two methodologies—i.e., historical and forward looking—may likely produce similar cost results in the pole attachment context.[152] In addition, cable attachers frequently do not have a realistic option of installing their own poles or conduits both because, in many cases, attachers are foreclosed by local zoning or other right of way restrictions from constructing a second set of poles of their own and because it would be prohibitively expensive for each attacher to install duplicative poles.[153] Thus, because attachers frequently do not face a realistic "make or buy" decision, the benefits of giving proper cost signals to new entrants are less pronounced in the pole attachment context. Moreover, the pole attachment formula does account for the costs incurred when poles are replaced by utilities in the normal course of their business because the formula uses actual year end asset and expense data from records maintained and publicly reported as part of

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[151] *See* 47 C.F.R. § 51.505(b)(1) (forward-looking cost "should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration").

[152] *See* Local Competition Order, 11 FCC Rcd at 1585 (¶ 705) (stating that it cannot be determined in the abstract whether a forward-looking cost approach or a historical approach will produce higher cost figures in a particular setting).

[153] In addition, it is not clear that a policy which would encourage the erection of multiple duplicative poles in the public right of way is consistent with the Pole Attachment Act.

the utilities' regulated core electric or telephone business services. In fact, if a utility is required to replace a pole in order to provide space for an attacher, the attacher pays the full cost of the replacement pole.[154]

70. We have recognized that the continued use of the historical cost based pole attachment formula brings certainty to the regulatory process. For more than two decades,[155] the pole attachment formula has provided a stable and certain regulatory framework, which may be applied "simply and expeditiously" requiring "a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."[156] We have found that switching to a methodology based on forward-looking economic costs would significantly change and burden the Commission's processes, requiring the Commission to develop a new formula, which would necessitate a protracted rulemaking proceeding involving complicated pricing investigations.[157] We have acknowledged that, in

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[154] If there is not adequate space on an existing pole for an attacher, the attacher is usually required to pay up front to replace the pole with a larger pole. The Commission has never held that the Pole Attachment Act, which anticipates a range of reasonable rates, prohibits a utility from being directly compensated by an attacher for such incremental, non-recurring costs. Alternatively, a utility could include an allocated portion of these costs in its annual rental rate, but most utilities prefer to recover up front, the full amount of make-ready or pole change out costs. Such costs are required to be excluded from the annual rate calculation to avoid a double recovery by the utility. *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 at 28 (2000).

[155] *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 at ¶ 9 (2000).

[156] *See* 1977 Senate Report at 21 (stating that it was the desire of the drafters "that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation").

[157] *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 at ¶ 9 (2000).

certain contexts, setting prices on the basis of forward-looking economic costs has advantages, such as giving the appropriate signal for new entrants to invest in network facilities; but, as explained above, these advantages are less pronounced in the pole attachment context because pole attachers are less likely to build, or may be prohibited from building, their own poles and conduit.[158] We have concluded and continue to find that, in the context of pole attachments, the continued use of historical costs accomplishes the key objectives of assuring just and reasonable rates to both the utility and the attaching parties, establishing accountability for prior cost recoveries, and encouraging negotiation among the parties by providing regulatory certainty.[159] We conclude that the Bureau's application of the Commission's pole attachment formula is neither arbitrary nor capricious.

## V. CONCLUSION AND ORDERING CLAUSE

71. For the reasons discussed above, we conclude that Respondent's application for review and petition for emergency stay should be denied.

72. Accordingly, IT IS ORDERED, pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the Application for Review of Alabama Power Company seeking reversal of *In the Matter of Alabama Cable Telecommunications Assoc., et al. v. Alabama Power Company*, PA 00-003, DA 00- 2078 (released September 8, 2000), IS DENIED and the referenced Petition for Emergency Stay IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
Magalie Roman Salas
Secretary

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[158] *Id.*

[159] *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 at ¶ 10 (2000).

EXHIBIT

List of Documents Filed in PA 00-003

Complaint

Complainant's Petition for Temporary Stay

Respondent's Motion to Dismiss Complaint and Petition for Stay

Respondent's Answer to Petition for Temporary Stay

Complainant's Opposition to Motion to Dismiss Complaint and Petition for Stay

Respondent's Motion for Leave to File Motion for Confidential Treatment of Commercial and Financial Information

Respondent's Response to Complaint and Motion for Confidential Treatment and Financial Information

Complainant's Motion for Extension of Time

Respondent's Motion to Strike

Respondent's Declaration of R.E. Prater

Respondent's Declaration of R.E. Prater (original signature)

Order, DA 00-1847

Complainant's Opposition to Respondent's Motion to Dismiss

Complainant's Supplement (to amend Exhibits 1,2,3,4,9 and 15 of the Complaint)

Respondent's Letter regarding Confidentiality Agreement

Complainant's Reply to Response and Opposition to Motion for Confidential Treatment

Complainant's Second Supplement (to amend Exhibits 1,2,4,9 and 15 of the Complaint)

Respondent's Motion to Strike and Reply to Opposition to Motion for Confidential Treatment

Order, DA 00-2078

Respondent's Resume of Rodney W. Frame (Part of Mr. Frame's Affidavit)

Application for Review

Emergency Petition for Stay Pending Judicial Review

Respondent's Motion for Leave to File Supplemental Authority

Respondent's Notice of Filing Supplemental Authority (affidavit of Henry Wise)

Respondent's two Letters which were inadvertently omitted from its Emergency Petition for Stay

Respondent's Original Affidavit (with original signature of Henry J. Wise)

Respondent's Letter (transmitting electronic documents)

Complainant's Opposition to Application for Review, Emergency Petition for Stay and Motion for Leave to File Supplemental Authority

Respondent's Reply to Opposition to Motion for Leave to File Supplemental Authority

Respondent's Reply to Opposition to Application for Review

Complainant's Letter updating the matter of confidential treatment for Respondent

Concurring Statement of Commissioner Harold W. Furchtgott-Roth

In the Matter of Alabama Cable Telecommunication Association, *et. al.*

I concur with several of the conclusions reached in this case. While the Commission must be observant of the Fifth Amendment when it implements and enforces Section 224 of the Act, the conclusions it reaches are always subject to judicial review for consistency with the law and the Constitution. The Commission should respect the role of the U.S. Court of Appeals for the 11th Circuit in deciding the question of whether compensation was just in this particular proceeding.

**APPENDIX C**

FEDERAL COMMUNICATIONS COMMISSION (F.C.C.)

[File No. PA 00-003]

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DA 00-2078

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ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION;
COMCAST CABLEVISION OF DOTHAN, INC. *et al.*,
*Complaint*,

v.

ALABAMA POWER COMPANY,
*Respondent.*

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Adopted: September 8, 2000
Released: September 8, 2000

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By the Deputy Chief, Cable Services Bureau:

1. On June 23, 2000, the above-captioned Complainant filed a pole attachment complaint ("Complaint") with the Federal Communications Commission ("Commission") against the above-captioned Respondent pursuant to Section 224 of the Communications Act of 1934, as amended ("Pole Attachment Act")[1] and Subpart J of the Commission's Rules.[2] Complainant also filed a Petition for Temporary Stay ("Petition"). Respondent filed its Response on July 14, 2000. Along with its Response, Respondent filed a Motion to Dismiss the Complaint for lack of jurisdiction, a Motion for

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[1] 47 U.S.C. § 224.

[2] 47 C.F.R. §§ 1.1401-1.1418.

Confidential Treatment of its financial information and an opposition to Complainant's Petition. Complainant filed its Reply on August 29, 2000, along with its opposition to Respondent's Motion for Confidential Treatment.[3] Our rules require that the parties seek first to resolve their differences by negotiation.[4] Based on our review of the record, we believe that further negotiations between the two parties are likely to be fruitless.[5] In this Order, we deny Respondent's Motion to Dismiss, we grant the Complaint in part, we temporarily grant Respondent's Motion for Confidential Treatment in part and we dismiss the Petition for Stay as moot.

2. Pursuant to the Pole Attachment Act, the Commission has the authority to regulate the rates, terms, and conditions for attachments by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. The Commission shall provide that such rates, terms and conditions are just and reasonable.[6] The Pole Attachment Act grants the Commission general authority to regulate such rates, terms and conditions, except where such matters are regulated by a State.[7] The

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[3] We granted Complainant an extension of time to file its Reply. *See In the Matter of Alabama Cable Telecommunications Association, et al. v. Alabama Power Company*, File No. PA 00-003, DA 00-1847 (released August 11, 2000). On August 11, 2000, the parties reached an agreement concerning the confidential treatment of information provided to the Complainant by the Respondent, and Complainant was provided with an unredacted copy of the Response. *See* letter dated August 22, 2000 to Kathleen F. Costello, Cable Services Bureau, from Raymond A. Kowalski, counsel for Respondent.

[4] 47 C.F.R. § 1.1404 (1)(1999).

[5] Complaint at ¶ 20.

[6] 47 U.S.C. § 224(b)(1).

[7] 47 U.S.C. § 224(b)(1) and (2). Alabama has not certified that it regulates rates, terms and conditions of pole attachments. *See* Public Notice,

Commission is authorized to adopt procedures necessary to hear and to resolve complaints concerning such rates, terms, and conditions.[8] The formula developed to resolve complaints concerning rates is known as the Cable Formula. The Telecommunications Act of 1996 ("1996 Act"),[9] expanded the scope of Section 224 by applying the pole attachment rate formula to rates for pole attachments made by telecommunications carriers[10] in addition to cable systems,[11] until a separate methodology[12] becomes effective for telecommunications carriers after February 8, 2001.[13] Our current Cable Formula applies to attachments made by cable systems and telecommunications carriers providing telecommunications services until February 8, 2001.[14] A utility must charge a pole attachment rate that does not exceed the maximum amount

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"States That Have Certified That They Regulate Pole Attachments," DA 92- 201, 7 FCC Rcd 1498 (1992).

[8] 47 U.S.C. § 224(b)(1). The Commission has developed a formula methodology to determine the maximum allowable pole attachment rate. *See* Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order, 68 FCC 2d 1585 (1978); Second Report and Order, 72 FCC 2d 59 (1979); Memorandum and Order, 77 FCC 2d 187 (1980), *aff'd, Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (per curiam); and Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4387 (1987). *See also*, Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd 6777 (1998) and Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 (2000).

[9] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[10] 47 U.S.C. § 153(44).

[11] 47 U.S.C. § 153(8); 47 U.S.C. § 602(5).

[12] *See* Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd 6777 at ¶¶ 116-130 (1998).

[13] *See* 47 U.S.C. § 224(d)(3) and 47 U.S.C. § 224(e)(4).

[14] *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 at ¶ 5 (2000).

permitted by the formula developed by the Commission. We have concluded that "where onerous terms or conditions are found to exist on the basis of the evidence, a cable company may be entitled to a rate adjustment or the term or condition may be invalidated."[15]

3. The parties to this Complaint have been engaged in an approximately 20 year relationship, during which time Complainant's attachments to Respondent's poles were governed by agreements which provided for Complainant to pay an annual pole attachment fee to Respondent. For a number of years prior to this Complaint, the parties' have used the Commission's Cable Formula as the basis for negotiating this rate. For the year beginning July 1999 through June 2000, Complainant was charged an annual pole attachment rate of $7.47 per pole.[16] Complainant has not challenged that rate. In June of this year, Respondent announced that it was rescinding all existing agreements and desired Complainant to enter into new agreements, effective September 11, 2000, which are similar to the old agreements except that the annual rate charged is $38.81 instead of $7.47. Complainant responded by filing this Complaint. In order to calculate a reasonable pole attachment rate when the parties to a pole attachment agreement cannot negotiate a reasonable rate, we apply our Cable Formula using public data when available. Both parties submitted pole attachment rate calculations that drew similar conclusions. Complainant even submitted calculations that took into account arguments raised by Respondent, which increased the maximum rate calculation.[17]

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[15] Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Order and Opinion on Reconsideration, 4 FCC Rcd 468 at ¶ 25 (1989).

[16] *See* Complaint at Exhibit 4.

[17] We decline to address the parties' specific issues relating to the application of the formula because, under any scenario proposed by the

Complainant has agreed to pay an annual pole attachment rate of $7.47, which exceeds the maximum rate either party calculated using the formula prescribed by the Pole Attachment Act, and therefore exceeds Respondent's fully allocated costs associated with the attachment.

4. Respondent does not attempt to justify its $38.81 rate using the Cable Formula. Instead Respondent argues first that we dismiss the Complaint for lack of jurisdiction, based on the recent decision in *Gulf Power, et al. v. FCC*[18] ("*Gulf Power II*"). *Gulf Power II* disposed of consolidated petitions for review of the Commission's Order[19] implementing 47 USC § 224, as amended by the 1996 Act. Further litigation in this matter is in progress and as a consequence, the mandate in the *Gulf Power II* proceeding has not been issued by the Court. Pending the issuance of a mandate from the Court, or a clarification of the *Gulf Power II* decision, we will continue to apply our pole attachment rules to all attachers who are either cable service or telecommunications service providers. Therefore, we will deny Respondent's Motion to Dismiss.

5. Respondent next poses a variety of arguments in support of changing the Cable Formula. All of these arguments have been addressed and rejected in prior Commission Orders. For two decades the Cable Formula has provided a stable and certain regulatory framework, that may be applied simply and expeditiously requiring "a minimum of staff, paperwork and procedures consistent with fair and effic-

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Respondent, Complaint's agreed rate of $7.47 exceeds the fully allocated costs.

[18] *Gulf Power, et al. v. FCC and USA*, 208 F. 3d 1263 (11th Cir., released April 11, 2000).

[19] Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151, FCC 98-20, 13 FCC Rcd 6777 (1998).

ient regulation."[20] Congress did not believe that special accounting measures or studies would be necessary because most cost and expense items attributable to utility pole, duct and conduit plant were already established and reported to various regulatory bodies, in this case, to the Federal Energy Regulatory Commission ("FERC").[21] Further, the United States Supreme Court has upheld the Cable Formula for calculating pole attachment rates.[22] Respondent bases its arguments on the 1996 Act amendments to the Pole Attachment Act, which imposed upon all utilities, the duty to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[23] This directive ensures that "no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields."[24] Because the Court in *Gulf Power, et al. v. FCC*[25] ("*Gulf Power I*"), held that application of the mandatory access provisions of the amended Pole Attachment Act effect a taking of utility property under the Fifth Amendment to the

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[20] *See* S. Rep. No. 95-580, 95th Cong., 1st Sess. at 21 (1977) (stating that it was the desire of the drafters "that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation").

[21] *Id.*

[22] *FCC v. Florida Power Corporation*, 480 U.S. 245 *(1987)*; *see also*, *Gulf Power v. USA*, 998 F. Supp. 1386 (N.D. Fla 1998), *aff'd*, 187 F.3d 1324 (11th Cir. 1999).

[23] 47 U.S.C. § 224(f)(1).

[24] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 at ¶ 1123 (1996).

[25] *Gulf Power, et al. v. USA and FCC*, 187 F.3d 1324 (11th Cir. 1999).

United States Constitution,[26] Respondent proffers that this change in the Pole Attachment Act has changed the nature of its relationship with Complainant from a voluntary relationship to an involuntary relationship. Due to this change, Respondent argues that the pole attachment fee must now satisfy the constitutional requirement of just compensation.

6. The Commission's rules governing pole attachment rates are directly derived from the Pole Attachment Act.[27] Under the Commission's rules, a utility is compensated in full for any make-ready or change-out costs associated with the attachment.[28] Although our rules do not allow a utility to recover twice for these costs,[29] the Cable Formula used to calculate an annual pole attachment rate allows a utility full recovery of its costs associated with the space used for the attachment as well as a return on capital. In order to avoid a prolonged and complex methodology, our policy has been

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[26] U.S. Const., amend V (private property shall not be taken for public use without just compensation).

[27] The Supreme Court found that Congress enacted this legislation "as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service." *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987). By conferring jurisdiction on the Commission to regulate pole attachments, Congress sought to constrain the ability of telephone and electric utilities to extract monopoly profits from cable television systems operators in need of pole space. *Id.* at 247-48. *See also Alabama Power Co. v. FCC*, 773 F.2d 363, 364 (D.C. Cir. 1985).

[28] "Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. A pole "change-out" is the replacement of a pole to accommodate additional users.

[29] We have stated on numerous occasions that the attaching entity should not be charged twice for the same costs, once for make-ready costs and again for the same costs if the business expense is reported in the corresponding pole or conduit capital account. *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 at ¶ 7 (2000).

that not every detail of pole attachment cost must be accounted for, nor every detail of non-pole attachment cost eliminated from every account used in the Cable Formula. The inclusion of unrelated expenses in certain accounts is balanced by the exclusion of minor expenses that may have a legitimate nexus to pole attachments in other accounts. The continued use of a clear rate formula by the Commission is essential to encourage parties to negotiate for pole attachment rates, terms and conditions and to avoid a prolonged and expensive complaint process. We believe the Cable Formula accomplishes these objectives and provides just compensation to the utility for the space occupied on the pole.

7. We do not believe that an attacher that is already attached to a utility's poles needs to file a complaint for access under the Commission's rules. However, to avoid any confusion, we will order Respondent to allow the Complainant to continue to remain attached at the current rate of $7.47, pending the satisfactory negotiation of a new agreement. Because Respondent failed to justify its proposed annual pole attachment rate of $38.81, we find that rate to be unreasonable pursuant to the Pole Attachment Act and the Commission's rules. We will order the parties to negotiate a new agreement in good faith using the Cable Formula as a guide to establishing a reasonable rate. To the extent that Complainant has paid the $38.81 rate, we will order refunds of any charges over the $7.47 amount.

8. Finally, Respondent requests confidential treatment of its commercial and financial information. Because the parties have reached an agreement on the terms of disclosure of this information to the Complainant, it is not essential to a resolution of this Complaint to make a final determination of this issue at this time. We are hard put to find justification for the confidential treatment of public documents but due to the changing nature of utility regulation, we will reserve this issue for further review. In the interim, we will continue to

withhold the requested material from public disclosure. However, we emphasize that it is never appropriate to withhold FERC Form 1 data and other essential data from an attacher, nor is it ever appropriate to require an attaching entity to agree to any curtailment of its statutory right to access this information and to file a complaint along with its analysis of the information with the Commission. We also emphasize the necessity of Respondent filing a complete, unredacted copy of the FERC Form 1 with the Commission. Additionally, because we resolve the Complaint herein, we will dismiss the Petition for Stay as moot.

9. Accordingly, IT IS ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that the complaint referenced herein IS GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent's Motion to Dismiss IS DENIED.

11. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent's Motion for Confidential Treatment is GRANTED IN PART TO THE EXTENT INDICATED HEREIN, pending our further review.

12. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Complainant's Petition for Temporary Stay IS DISMISSED AS MOOT.

13. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent continue to GRANT ACCESS to Complainant on the terms of the

existing agreements pending the negotiation of new agreements and that the pole attachment agreements between Respondent and Complainant ARE MODIFIED TO THE EXTENT INDICATED HEREIN.

14. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that the annual pole attachment rate of $38.81, IS UNREASONABLE and IS TERMINATED.

15. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that the annual pole attachment rate of $7.47 IS CONTINUED, pending further negotiations.

16. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent, SHALL REFUND to Complainant, within thirty (30) days of the release of this Order, that portion of the amount paid in excess of $7.47, plus interest to the date of refund, for the period from June 23, 2000 to the present, plus interest.

17. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent and Complainant SHALL NEGOTIATE IN GOOD FAITH, new pole attachment agreements with a just and reasonable annual pole attachment rate, in accordance with the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief
Cable Services Bureau

**APPENDIX D**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jan. 08, 2003]

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No. 00-14763-TT

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ALABAMA POWER COMPANY
*Petitioner,*

versus

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
*Respondents,*

ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION,
COMCAST CABLEVISION OF DOTHAN, INC., AMERICAN
ELECTRIC POWER SERVICE CORPORATION
*Intervenors.*

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No. 00-15068-TT

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GULF POWER COMPANY,
*Petitioner,*

versus

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
*Respondents,*

AMERICAN ELECTRIC POWER SERVICE CORPORATION,
COMMONWEALTH EDISON COMPANY,
DUKE ENERGY CORPORATION,
*Intervenors.*

No. 01-13058-TT

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ALABAMA POWER COMPANY AND
GULF POWER COMPANY,

*Petitioners,*

versus

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES

*Respondents,*

ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION, COMCAST CABLEVISION OF DOTHAN, INC., *et al.*, AND AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, *et al.*,

*Intervenors*

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On Petition for Review of a Final Order of
The Federal Communications Commission

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BEFORE: TJOFLAT, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Petitioner, Alabama Power Company, is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

No. 01-13058-TT

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ALABAMA POWER COMPANY AND
GULF POWER COMPANY,
*Petitioners,*

versus

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES,
*Respondents,*

ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION
COMCAST CABLEVISION OF DOTHAN, INC., *et al.*,

and

AMERICAN ELECTRIC POWER SERVICE CORPORATION,
COMMONWEALTH EDISON COMPANY, *et al.*,
*Intervenors.*

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On Petition for Review of a Final Order of
The Federal Communications Commission

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th cir., 19__, ____F.2d___).

Before: TJOFLAT, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

# APPENDIX E

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
PART I—COMMON CARRIER REGULATION

## § 224. Pole attachments

(a) Definitions

As used in this section:

(1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(5) For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

(f) Nondiscriminatory access

(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminator [1] basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(g) Imputation to costs of pole attachment rate

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(h) Modification or alteration of pole, duct, conduit, or right-of-way

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of

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[1] So in original. Probably should be "nondiscriminatory".

such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).